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THE CASE AGAINST VICARIOUS JURISDICTION

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INTRODUCTION

The law of adjudicatory jurisdiction, or *personal* jurisdiction as it is more commonly called, concerns a court's power to render judgments enforceable in the forum and by other sovereign states. For U.S. courts, both state and federal, judicial jurisdiction is as essential to

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institutional existence as oxygen is to human beings. Without it, courts are unable to render binding judgments; without it, they are paper tigers.

Measuring the breadth of judicial power under modern jurisdictional doctrine is not a formulaic undertaking, to be sure, but most of the time all that is required is to take into account the acts or omissions of a single defendant in relation to the forum. That is, we frequently need look no further than to see whether the defendant's own conduct makes her amenable to suit. If I travel to collect a debt from one who has taken up residency in a distant state and, in the collection process, inflict physical injury on the debtor, there is little question that I must be prepared to defend myself in that forum against a civil suit, under penalty of default if I do not appear. Even when a defendant does not personally commit any acts in or directed at the forum, modern statutes and constitutional doctrine render the absent actor amenable to suit. Following the procedural revolution of *International Shoe Co. v. Washington*,[1] defendants are no longer able to evade the jurisdictional grasp of a court merely by taking the expedient step of retreating from the forum before being served or, for that matter, not setting foot within the state at all but instead acting from a safe distance. Thus, I cannot avoid being subject to suit by hiring someone else and instructing her to use all means necessary to collect the debt in the forum state on my behalf. Upon a close examination of modern jurisdictional doctrine, we may discover two different rationales to explain why the exercise of jurisdiction would be upheld.

Jurisdiction may be predicated on the actions I personally took in hiring someone to find and arrest the debtor in the forum state. For jurisdictional purposes, my actions have both statutory and constitutional relevance. These were purposeful acts that were directed to cause injury in the forum.[2] I personally retained someone to act on my behalf and either knew or should have known that if kneecaps were broken the injury would be felt (painfully) by the debtor in the forum. The Supreme Court has recognized that in these

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[1] 326 U.S. 310 (1945).

[2] *See, e.g.*, N.Y. C.P.L.R. 302(a) (McKinney 2001) ("As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who [acted] in person or through an agent . . . .").

circumstances the forum state may exercise jurisdiction without violating due process.[3]

In the situation in which one hires someone else to collect a debt, the first explanation for the exercise of state court power over her is similar to the rationale that justifies jurisdictional amenability when she personally travels to the forum: in both instances, jurisdiction is triggered by her own actions. While we may conceive of jurisdiction as based on the personal conduct of the named defendant, a second, alternative rationale may justify the exercise of judicial jurisdiction by the forum court over a nonresident. Unlike the prior basis, which focuses exclusively on what one personally did in the forum or on what actions she personally took outside of the forum that she knew or should have known would cause injury within the state, it is also possible to base the exercise of state court power on the attribution of her agent's forum contacts to her. Under this second formulation, jurisdiction may be understood as triggered not by one's own contacts with the forum, but by the jurisdictionally sufficient contacts or forum nexus of another. Of course, to make this jurisdictional leap, a valid basis is needed for treating another person or entity's jurisdictionally sufficient contacts as though they were the defendant's. That is, there must be some substantive legal rule that permits the court to disregard a juridical entity's otherwise separate legal existence.

In the example above, agency law may be called upon to justify the imputation of contacts. When one, a principal, hires and instructs another, an agent, to act on her behalf by traveling to the forum to collect a debt, she creates an agency relationship between them.[4] When the agent carries out the job, she is acting within the course and scope of her agency; that is, she is acting as the principal intended her to act. If the principal is liable for any injuries the agent causes in the forum as a matter of substantive law, then it may be argued

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[3] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

[4] *See* RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (1958) (observing that agency requires a showing of (1) "the manifestation by the principal that the agent shall act for him," (2) "the agent's acceptance of the undertaking," and (3) the parties' understanding "that the principal is to be in control of the undertaking"); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 2, 2001) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

correspondingly that, as an a priori matter, under modern jurisdictional doctrine the principal is amenable to any suit in the forum state arising out of those injuries.

There is nothing especially remarkable about this second explanation for why the forum court would be able to exercise jurisdiction over the principal for having instructed an agent to collect the debt on her behalf. The attribution of contacts of one person or entity to another for jurisdictional purposes is a frequently seen and often invoked form of traditional jurisdictional argument. Indeed, this rationale is necessary for engaging in jurisdictional analysis for any case involving nonnatural entities, such as corporations, which cannot act except through others. In *International Shoe*, which rejected the old "presence" theory of jurisdiction, Justice Harlan Stone noted, in one of the most important passages of the opinion, that to ask whether the corporation is present in the forum so as to satisfy due process "is to beg the question to be decided."[5] Corporate presence, he observed, "can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[6] We measure jurisdiction over a corporation by the extent and kind of activities "of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process."[7] Justice Felix Frankfurter made a similar point three years later in his concurring opinion in *United States v. Scophony Corp. of America*.[8] In upholding service of process and the exercise of jurisdiction over a foreign corporate parent based on in-state service on its domestic affiliate, he wrote: "What was done in the Southern District of New York on behalf of [the parent] . . . establishes that the corporation was there transacting business and was found there in the only sense in which a corporation ever 'transacts business' or is 'found.'"[9]

Even though the use of vicarious jurisdiction for nonnatural entities is a recognized and unremarkable application of jurisdiction, the incorporation of substantive law into the measure of adjudicatory jurisdiction can be problematic. While reliance on such law may be useful to identify forum contacts, agency law, and other similar substantive law doctrines—such as respondeat superior, civil and criminal conspiracy, and especially, the corporate law doctrine of veil

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[5] 326 U.S. at 316.

[6] *Id.*

[7] *Id.* at 317.

[8] 333 U.S. 795 (1948).

[9] *Id.* at 819 (Frankfurter, J., concurring).

piercing—it may be misused in a manner that produces jurisdictional determinations that are neither sound nor necessary. The line between reasoned analysis and rudderless doctrine is difficult to identify and easy to cross. Veil piercing and agency theory are the areas of substantive law most frequently invoked to justify the exercise of vicarious jurisdiction. As a result, this Article concentrates on the intersection of these two doctrines of substantive law with the law of judicial jurisdiction.[10]

To better understand how the substantive law of veil piercing is used to measure judicial jurisdiction, consider a common fact pattern one encounters in case law. A lawsuit is brought against a company that is chartered and headquartered outside of the forum state and is not subject to that forum's jurisdiction based on its own contacts. If the named defendant is the corporate parent of a wholly owned subsidiary that is amenable to suit in the forum, the plaintiff might borrow from the substantive corporate law of veil piercing to assert that the two corporations should be regarded as one and the same for jurisdictional purposes. The veil-piercing doctrine typically provides that a subsidiary corporation and its otherwise separate owner (whether a natural person or a corporate affiliate) will be treated as one if the corporate form has been "misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf"[11] or where the corporate form has been "used as a mere agency or instrumentality of the owning company."[12] If the two corporations are treated as one for substantive liability purposes, the plaintiff would argue that the forum contacts of the subsidiary may be imputed to the parent so as to bring it within the forum court's reach.

As we shall see, the use of veil-piercing law for jurisdictional purposes occurs frequently in our modern case law, yet its origins may be traced to a convergence of paths that occurred more than three quarters of a century ago. At issue in *Cannon Manufacturing Co. v. Cudahy Packing Co.*[13] was the reach of the territorial jurisdiction of the United States District Court for the Western District of North Carolina over a Maine corporation whose principal place of business was in Illinois.[14]

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[10] For one earlier work that discusses the use of conspiracy law in the jurisdictional test, see Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234 (1983).

[11] United States v. Bestfoods, 524 U.S. 51, 62 (1998).

[12] Chi., Milwaukee & St. Paul Ry. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 501 (1918).

[13] 267 U.S. 333 (1925).

[14] *Id.* at 334.

The plaintiff argued that the activities of its wholly owned affiliate in North Carolina were sufficient to bring the nonresident parent within the court's jurisdictional ambit.[15] The plaintiff maintained that attributing the presence of the subsidiary to the out-of-state parent was appropriate for jurisdictional purposes because the two corporations, as a matter of substantive corporate law, should be regarded as one and the same.[16]

In many respects, *Cannon* reads very much like a decision from a bygone age. At that time, the law regarding the limited liability protections of the corporate form was inchoate and uncertain. Moreover, when *Cannon* was decided the jurisdictional rules were premised on a theory of state court power long since discredited. Despite the doctrinal obsolescence of both its procedural and substantive features, Justice Louis Brandeis's decision stands as one of the most significant modern crossroads of substance and procedure. *Cannon* is the fountainhead from which many modern conceptions of jurisdictional doctrine and theory flow. Like a great, old movie that may be dated by more contemporary cinematic standards, *Cannon* still stands as a classic and continues to influence more recent adaptations of the field.[17]

The questions that bedeviled the Court at that time remain just as relevant and perplexing to us now. How should the substantive law treat persons who act through the corporate form? To what extent does limited liability shield owners from suit? Even before reaching these substantive questions, there was and still is the a priori matter of determining the reach of state court territorial authority to bind corporations and corporate actors not present in the forum. To be sure, the modalities of the doctrinal debates regarding both corporate and jurisdictional law have shifted and evolved over the last seventy-five years; but the issues that were joined in the *Cannon* case at the end of the first quarter of the twentieth century remain challenging at the start of the next. Indeed, with the focus on corporate accountability sharply intensifying in recent times, with the debate raging daily over the broadening of personal responsibility for corporate acts and omissions, and with scandals over some of the country's biggest and most well-known corporations punctuating the current national dialogue,

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[15] *Id.* at 335.

[16] *Id.* at 337-38.

[17] *See infra* Part II (reviewing the state of jurisdictional doctrine as it existed at the time *Cannon* was decided).

these abiding legal questions may be even more pertinent—and vexing—today.[18]

From our vantage point three quarters of a century later, it is hard to overstate the significance of *Cannon* as the originating precedent validating the use of veil piercing for jurisdictional purposes. Consider, as one measure, how often veil piercing is relied upon for procedural purposes. Dean Phillip Blumberg's masterful multivolume treatise, *The Law of Corporate Groups*, devotes an entire volume in excess of 450 pages (and a supplement of nearly equal length) to cataloging judicial decisions in which the substantive law is invoked as the sought-after predicate for a vicarious jurisdictional determination.[19] His work demonstrates that federal and state reporters are littered with jurisdictional veil-piercing cases. Similarly, Robert Thompson found a substantial number of cases in which veil piercing was relied upon for jurisdictional purposes.[20] Blumberg's exhaustive study and Thompson's empirical work confirm, both in absolute terms and on a percentage basis (as compared with all personal jurisdiction challenges[21]), that the incidence of cases where a vicarious jurisdictional argument was at issue is significant.[22] Every United

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[18] *See generally* Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 HOUS. L. REV. 1 (2003) (discussing corporate governance issues arising from November 2001 to November 2002, including scandals at Enron, WorldCom, Aldephia, and Tyco, and passage of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C.S., 15 U.S.C.S., 18 U.S.C.S., 28 U.S.C.S., 29 U.S.C.S.)).

[19] PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (1983); PHILLIP I. BLUMBERG & KAREN P. WACKERMAN, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS (Supp. 2002).

[20] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1060 (1991) (documenting 141 cases in which jurisdiction was asserted on the basis of veil piercing). In his treatise, Blumberg identifies substantially more cases than were identified in Thompson's empirical study because he focuses on veil piercing not only as it has been invoked for judicial jurisdiction as a matter of federal constitutional law, but also for service of process; federal subject matter and diversity jurisdiction; the general federal venue statute; specific federal venue statutes; res judicata and collateral estoppel; joinder of parties; injunctions; multiple derivative actions; standing to sue under section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p (2000); and several other procedural contexts. BLUMBERG, *supra* note 19.

[21] *See, e.g.*, Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 24-26 (1998) (identifying 975 reported state supreme court and federal appellate court decisions over a twenty-five-year period, from January 1, 1970, to December 31, 1994, in which the issue of personal jurisdiction had been raised).

[22] *See also* LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 562-63 (2002) (observing that "there is increasing litigation over the effect on jurisdictional analysis of corporate ties").

States court of appeals,[23] along with innumerable federal district courts and state courts,[24] has had to consider the validity of jurisdictional veil-piercing arguments. Moreover, the use of this form of vicarious jurisdiction pervades not only domestic litigation, but international civil litigation in U.S. courts as well.[25]

It is not only the prevalence of these arguments that makes the subject an important one on which to concentrate. The use of veil piercing is particularly troubling—and, therefore, particularly compelling to reexamine—because the incorporation of the substantive law for jurisdictional purposes has been largely accepted as an article of faith among courts and commentators. Virtually without dissent during the better part of this century, the lower courts have approved jurisdictional veil-piercing arguments to satisfy the statutory and constitutional requirements for amenability to suit.[26] The conventional academic view has not challenged the use of veil piercing either.[27] Blumberg, for instance, is critical of what he calls the traditional account of *Cannon* and disapproves of the "entity" theory of corporate

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[23] For examples of courts of appeals addressing jurisdictional veil piercing, see *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94-99 (2d Cir. 2000); *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1291-95 (11th Cir. 2000); *Ranger Enterprises, Inc. v. Leen & Associates, Inc.*, Nos. 97-35077, 97-35078, 1998 WL 668380, at *3-4 (9th Cir. Sept. 21, 1998); *IDS Life Insurance Co. v. SunAmerica Life Insurance Co.*, 136 F.3d 537, 540-41 (7th Cir. 1998); *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1273-76 (6th Cir. 1998); *Genetic Implant Systems, Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458-60 (Fed. Cir. 1997); *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996); *Gundle Lining Construction Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 205-09 (5th Cir. 1996); *Gray v. Riso Kagaku Corp.*, No. 95-1741, 1996 WL 181488, at *2-4 (4th Cir. Apr. 17, 1996); *T & N, PLC v. Pennsylvania Insurance Guaranty Ass'n*, 44 F.3d 174, 181-83 (3d Cir. 1994); *Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F.3d 56, 62 (4th Cir. 1993); *H.H. Robertson Co. v. V.S. DiCarlo General Contractors, Inc.*, 994 F.2d 476, 477 (8th Cir. 1993); *Donatelli v. National Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990); *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 520 (9th Cir. 1989); *I.A.M. National Pension Fund v. Wakefield Industries, Inc.*, 699 F.2d 1254, 1257 (D.C. Cir. 1983); *Lucas v. Gulf & Western Industries, Inc.*, 666 F.2d 800, 801 (3d Cir. 1981); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132, 135-36 (10th Cir. 1962).

[24] For examples of state courts addressing jurisdictional veil piercing, see *Sternberg v. O'Neil*, 550 A.2d 1105, 1107 (Del. 1988); *Wise v. State Board for Examination, Qualification & Registration of Architects*, 274 S.E.2d 544, 547 (Ga. 1981); *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 797 (Tex. 2002); *Schwartz v. Frankenhoff*, 733 A.2d 74, 76 (Vt. 1999); *Bowers v. Wurzburg*, 519 S.E.2d 148, 156 (W. Va. 1999).

[25] *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 151-70 (3d ed. 1996) (discussing the incorporation of substantive law into the jurisdictional inquiry in the context of international civil litigation).

[26] *See infra* Part I.C (stating that courts often approve these arguments and blur the distinctions between statutory and constitutional restrictions on suits).

[27] *See infra* text accompanying notes 31-33 (discussing some leading academic works that favor employing the veil-piercing doctrine for jurisdictional purposes).

law, which treats the corporation separately from its owners and affiliates.[28] Nonetheless, his endorsement of "enterprise liability," as it is applied for jurisdictional purposes, relies unavoidably on an attributive jurisdictional model.[29] Indeed, the status-based jurisdictional scheme he advocates is indifferent to the lack of direct connection between the defendant and the forum.[30]

In contrast to Blumberg's position, Lea Brilmayer and Kathleen Paisley, authors of the leading academic exegesis of *Cannon* and its progeny, argue in favor of employing substantive law, including the veil-piercing doctrine, to determine whether a constitutional basis exists for exercising jurisdiction.[31] To their credit, Brilmayer and Paisley were the first to closely analyze the subject. Their article, which has had considerable influence on courts and the practicing bar, carefully parses the case law to identify how substantive law has been employed in the jurisdictional equation.[32] Their study, however, also has had the unfortunate effect of lending scholarly imprimatur to the use of veil-piercing law for jurisdictional ends. Following suit, nearly all other commentators also have accepted that the corporate law doctrine of

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[28] *See* BLUMBERG, *supra* note 19, at 25 (noting that the entity theory is outmoded and not in touch with economic reality).

[29] *See infra* text accompanying notes 189-205 (arguing that Blumberg and courts following him reject *Cannon* only insofar as it applied a formalistic test but still accept, without further qualification, use of substantive law for jurisdictional purposes).

[30] *See* BLUMBERG *supra* note 19, at 460 (concluding that it is appropriate for jurisdiction to depend not on a direct connection between the defendant and the forum but on "[c]oncern with the enterprise as a whole—with the extent of centralized control and economic integration" and on basic procedural policies such as "the reasonable expectation by a foreign constituent deriving income from the forum that it might be haled into court in the distant jurisdiction"). For this reason, and others, I do not favor an enterprise liability framework as an alternative to the prevailing model of vicarious jurisdiction. *See infra* Part III (arguing that courts are capable of focusing on the jurisdictional inquiry exclusively based on a parent's connection to the litigation in specific jurisdiction cases and its own contacts with the forum state in general jurisdiction cases); *see also* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 67 (1996) ("Blumberg has attempted to specify the boundaries of the firm based on 'the degree of economic integration [within the corporate] group.'... Ultimately, he fails to specify what constitutes 'economic integration' or to address the issue of whether enterprises are in fact separable from one another." (alteration in original) (citations omitted)).

[31] *See* Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 28 (1986) ("[D]ue process should take into account only bona fide state substantive relations, and it should truncate such substantive relations only in certain limited circumstances.").

[32] *See, e.g.*, Third Nat'l Bank v. WEDGE Group Inc., 882 F.2d 1087, 1094 (6th Cir. 1989) (Keith, J., concurring) (citing Brilmayer and Paisley's work in upholding jurisdiction over the named defendant based, inter alia, on the indirect attribution of contacts). For a more complete list of authorities citing their work, see *infra* note 63.

veil piercing may be invoked to justify the exercise of jurisdiction over a nonresident defendant.[33]

I argue in these pages, against the grain of judicial and academic wisdom, that the use of veil piercing for jurisdictional purposes is unwarranted as a matter of precedent and unwise as a matter of policy. Part I begins with a note on the tripartite jurisdictional test and discusses the particular relevance of agency principles to the application of the jurisdictional inquiry. Having laid this foundation, it then takes a new look at an old case. Part II argues that the predominant view of the lower courts and commentators is wrong: *Cannon* does not support using the substantive law of veil piercing for vicarious jurisdictional ends. The historian Edward Purcell has shown how judicial decisions can be, and often are, interpreted beyond their historical context over time.[34] Similar to his decision in *Erie Railroad v. Tompkins*,[35] Justice Brandeis's opinion for a unanimous court in *Cannon* has been pulled from its historical moorings. Setting the record straight may help both to improve the understanding of the case and to clarify the limits of its intended reach in the modern era.

Finally, in Part III, I leave the question of the proper interpretation of *Cannon* to one side and focus instead on constructing the case against the use of veil piercing in the evaluation of jurisdiction. In this Part, I offer two arguments against jurisdictional veil piercing: the

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[33] For examples of academic commentators stating that piercing the corporate veil of a subsidiary can lead to jurisdiction over the parent, see Michael H. Cardozo, *A New Footnote in* Erie v. Tompkins*: "*Cannon *is Overruled,"* 36 N.C. L. REV. 181, 183 (1958); J. J. Fawcett, *Jurisdiction and Subsidiaries*, 1985 J. BUS. L. 16, 25; Michael G. Albano, Note, *Agency As a Means of Obtaining Jurisdiction in New York over Foreign Corporations: A Failed Theory*, 20 BROOK. J. INT'L L. 169, 174 (1993); Meryl Berger, Case Comment, *Jurisdiction over a Foreign Corporation on the Basis of its Subsidiary's Activities in New York:* Bulova Watch Co. v. K. Hattori & Co., 9 BROOK. J. INT'L. L. 91, 101-11 (1983); Daniel G. Brown, Comment, *Jurisdiction over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 603-04 (1992); Murray E. Knudsen, Comment, *Jurisdiction over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 919 (1988); Daniel I. Reith, Comment, *Jurisdiction over Parent Corporations*, 51 CAL. L. REV. 574, 580-81 (1963); William A. Voxman, Comment, *Jurisdiction over a Parent Corporation in its Subsidiary's State of Incorporation*, 141 U. PA. L. REV. 327, 343-44 (1992). *But see* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 557-58 (1995) (criticizing the use of veil piercing in the jurisdictional context).

[34] *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 3 (2000) (contending that the judges and academic commentators interpreting *Erie* have failed to give the decision's historical position due regard).

[35] 304 U.S. 64 (1938).

first is pragmatic and the second is normative. Building on the work of corporate law scholars, my pragmatic argument focuses on the indeterminacy of veil piercing and the attendant consequences of importing this troubled substantive doctrine into the jurisdictional equation. In constructing the normative case, I argue that when veil piercing is not an inquiry into a defendant's own involvement in the underlying dispute, we have moved far from any meaningful connection between the application of substantive law and the sound rationale for exercising jurisdiction.

My ultimate claim is not that the abandonment of the use of veil piercing for jurisdictional purposes will fix all that ails modern jurisdictional doctrine. To the contrary, abandoning the use of jurisdictional veil piercing may make the blemishes in the law of personal jurisdiction more readily apparent. Requiring courts to focus on a defendant's own involvement with the forum is more likely to produce decisions consistent with the rationale that should support modern jurisdictional doctrine. This modest, but vital, reexamination of the law of jurisdiction then may serve as a catalyst for greater clarity in thinking about the general policy goals underlying jurisdictional law and how these objectives are best accomplished within our peculiar American federation.

I. THE TRIPARTITE NATURE OF JURISDICTIONAL INQUIRIES

It helps to think about the problem of vicarious jurisdiction by specifying the precise steps courts must take in determining the scope of judicial authority in any jurisdictional inquiry. In doing so, we can also identify the first two steps in the jurisdictional inquiry as the weakest points in the argument for jurisdictional veil piercing.

A. *The Question of Notice*

The first question in an examination of the judicial power over a defendant concerns notice. Before she may be bound by the judgment of the court, a defendant is statutorily and constitutionally entitled to formal notice through service of process of the commencement of legal proceedings against her.[36] To determine whether a defendant received adequate notice, a court must first evaluate the manner of service that the state (or federal) legislature has statutorily

[36] *See, e.g.*, Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) ("Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action.").

prescribed. Unless the defendant consents to suit in the state or is physically served while located therein, the plaintiff must identify some statutory authority for service of process on a nonresident.[37] Assuming the technical statutory predicates for effecting service are satisfied (i.e., mailed to the correct address, served by the proper official, delivered in the proper form at the proper time), then a court will find service valid, unless the method runs afoul of the Constitution. The Supreme Court has held that the Due Process Clause requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[38]

Even in this initial inquiry, agency principles play a role in the determination of proper notice. Service of process statutes that reference the term "agent" typically permit service on a person authorized as an agent for purposes of giving notice. In the Federal Rules of Civil Procedure, for example, service is proper on an individual by personally delivering a copy directly to the individual "or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process"[39] Rule 4(h) provides a comparable formulation for service on corporations and associations.[40] Identifying who is "an agent authorized by appointment" under Rule 4 usually poses few difficulties since most courts require an actual appointment to receive process in order to validate service.[41] The meaning of "agent by law" is more problematic, however. Some courts limit the scope of "agent by law" only to persons authorized by statute to accept service of process.[42] By contrast, other courts take a more expansive view of the phrase, permitting the invocation of state common law of agency[43] or the veil-piercing doctrine to validate

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[37] *See, e.g.*, COLO. REV. STAT. § 4(e) (2003) (listing Colorado's service of process alternatives for nonresidents).

[38] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[39] FED. R. CIV. P. 4(e).

[40] FED. R. CIV. P. 4(h).

[41] *See* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1097 (2d ed. 1987) (discussing how actual appointment as an agent is necessary for valid service).

[42] *See id.* § 1098 (noting that several decisions construe agency by law to mean legislative authorization to receive process).

[43] Few opinions, however, address the choice of law problem which arises from relying on state common law when measuring the validity of service on an agent within the meaning of Rule 4 of the Federal Rules of Civil Procedure. The Court's decision in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316-17 (1964), certainly suggests that state common law doctrine has no role to play in the definition of the term "agent" within the meaning of the federal service rules. "[E]ven if we were to

service on a designated, corporate representative as effective on the affiliated entity.[44]

B. *State and Nonconstitutional Federal Bases of Jurisdiction*

After determining whether there was proper service, the court's next step in the jurisdictional analysis is to determine whether state (or nonconstitutional federal) law authorizes the forum court to exercise jurisdiction over the defendant.[45] It is necessary to distinguish this statutory inquiry from the constitutional question of notice. The matter can be confusing because service of process statutes commonly set forth both the mechanism for giving notice and the legislatively approved limits for exercising jurisdiction (by identifying the bases that trigger a defendant's amenability to suit). If an out-of-state visitor drives into the state and, while there, accidentally injures a pedestrian, the second-step statutory question is whether the state has authorized its courts to exercise jurisdiction over nonresident drivers who negligently cause injury while in the forum. Indeed, all states have authorized this jurisdiction, either through a specific statute dealing with the act (such as a nonresident motorist statute) or by a general long-arm statute.[46]

Regrettably, courts evaluating assertions of vicarious jurisdiction often fail to maintain the distinction between service of process for purposes of giving notice and a statutory basis for amenability to suit. Of course, courts undertaking traditional jurisdictional inquiries are hardly immune from mistake, but many of the problems seen in the vicarious jurisdiction cases are distinct. The use of agency principles in such cases has been particularly troubling.

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assume that this [Rule 4] uniform federal standard should give way to contrary local policies, there is no relevant concept of state law which would invalidate the agency here at issue." *Id.*

[44] *See* WRIGHT & MILLER, *supra* note 41, § 1104 (describing how "[s]ervice on a proper agent of a subsidiary corporation may constitute sufficient service on the parent corporation").

[45] For an example of a court's reliance on this next step in the jurisdictional analysis, see *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987):

> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. . . . [This means] there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons.

Id.

[46] *See, e.g.*, COLO. REV. STAT. § 13-1-124(1)(b) (West 2003) (stating that the "commission of a tortious act within th[e] state" is a sufficient basis to come within the state court's jurisdiction).

At one time, in-state service was necessary for jurisdiction because of the territorial limitations imposed by the power theory.[47] Today, service and jurisdiction are separate,[48] but courts evaluating vicarious jurisdiction assertions sometimes conflate the term "agent," as it appears in service statutes, with the term "agency," contained in many long-arm statutes. Where long-arm statutes mention "agency," the term is typically used to define the breadth of the state court's jurisdictional authority. For instance, the New York long-arm statute begins with the clause: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . ."[49] The language of the statute suggests that the New York legislature authorized state courts to exercise jurisdiction not only over those who act personally, but also over those who make express arrangements to act through another.[50] Even where the legislature intended the jurisdiction authority in a particular long-arm statute to be applied more expansively through the use of the term "agent" or "instrumentality," it must remembered that specific jurisdiction is almost always the *only* authorized form of jurisdictional authority.[51] Judicial incorporation of agency, veil

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[47] *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State . . . . Any attempt to exercise authority beyond those limits would be . . . an illegitimate usurpation of power . . . .").

[48] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

> Historically the jurisdiction of courts to render judgments *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it . . . .

Id.

[49] N.Y. C.P.L.R. 302(a) (McKinney Supp. 2004).

[50] *See also* KAN. STAT. ANN. § 60-308(b) (2002) ("Any person, whether or not a citizen or resident of this state, *who in person or through an agent or instrumentality* does any of the acts hereinafter enumerated, thereby submits the person and, if an individual, the individual's personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of these acts" (emphasis added)); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 2004) ("In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident . . . recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.").

[51] *See, e.g.*, N.Y. C.P.L.R. 302(a) (McKinney 2003) (permitting personal jurisdiction over a nondomiciliary only "as to a cause of action arising from any of the acts [within the state] enumerated in this section" of the statute).

piercing, or other substantive doctrines used to invoke amenability for general jurisdiction purposes, therefore, does not honor the legislative intent. Unfortunately, even express language limiting state court authority to specific jurisdiction has not thwarted judicial efforts to expand jurisdictional reach through reliance on veil piercing.[52]

Regarding both the statutory notice question and the question of statutory amenability, Rule 4 of the Federal Rules of Civil Procedure requires federal courts to apply the forum state's substantive law in all diversity cases and in most federal question cases as well.[53] A legislative body defines the breadth of judicial authority at less than the allowable constitutional maximum, presumably, at least in part, because it seeks to give some guidance to outsiders concerning what conduct will trigger amenability to suit in the forum.[54] If the legislature decides not to extend the reach of its courts to the permissible limits of the Fourteenth Amendment, the application of a federal common law standard of vicarious jurisdiction (effectively broadening the territorial reach of the courts) redraws a boundary clearly within the province of the state legislature to mark.[55] Courts should not read into a service or long-arm statute that which lawmakers have chosen not to write.

C. *Federal Constitutional Limits to Jurisdiction*

The third and final step in a court's jurisdictional inquiry is to determine whether the exercise of jurisdiction is constitutionally permissible. A court only reaches this final issue after satisfying the notice and statutory amenability questions. Returning to the example of

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[52] *See, e.g.*, Frummer v. Hilton Hotels Int'l., Inc., 227 N.E.2d 851, 852-53 (N.Y. 1967) (upholding the exercise of general jurisdiction over a foreign parent corporation based on the veil-piercing theory despite statutory language limiting state court authority to specific jurisdiction).

[53] *See* FED. R. CIV. P. 4(k)(1)(A) (providing that "[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located").

[54] *See* William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437, 459, 461 (Supp. 1988) (arguing that subconstitutional law making "is prospective and rational and it usually draws its solutions to the issues at hand from fairly well-defined estimates of public policy, informed by a healthy regard for public opinion" and that, by comparison, "[t]he subjection of more and more human activity to the ultimate control of the ad hoc, case-by-case judicial invocation of principle reduces the certainty and stability of law").

[55] *See, e.g.*, Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1333 (E.D.N.Y. 1981) (distinguishing judicial and legislative responsibilities with regards to the determination of jurisdiction).

the nonresident motorist, assuming proper notice and a statutory basis for exercising jurisdiction, the pertinent constitutional question is whether the negligent operation of the car while in the forum state establishes a sufficient connection between the defendant and the forum such that the exercise of jurisdiction by a court within that forum would not offend due process.[56]

Although states are free to give less than the maximum scope of judicial authority to their courts, most have decided against it.[57] In these instances, where the legislature has linked the statutory grant of judicial authority to the constitutional maximum, no separate evaluation of legislative intent is usually necessary. Yet, there still remain good reasons for breaking down the inquiries into separate parts when questions of vicarious jurisdiction are at issue. Once again, principles of agency law can readily be misapplied in this context.

As with the New York long-arm statute, a state statute may authorize amenability to suit in cases where the defendant acted through an agent,[58] but the relevance of agency theory, if applicable at all, remains limited to the question of the legislative restrictions placed on judicial jurisdiction. Unfortunately, courts undertaking vicarious jurisdiction inquiries also sometimes blur the distinction between the question of statutory amenability to suit and the separate question of whether exercise of the court's statutory authority is constitutionally permissible.[59] Of course, vicarious jurisdiction cases are not the only occasions in which there is confusion between the statutory and constitutional inquiries.[60] The vicarious jurisdiction cases do offer a

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[56] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that due process requires "certain minimum contacts" between the out-of-state defendant and the forum state before defendant may be subject to in personam jurisdiction).

[57] *See generally* 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS §§ 4-1 to -7 (LEXIS L. Publ'g, 3d ed. 1998) (1983) (cataloging and discussing the history of state long-arm statutes that extend the scope of personal jurisdiction to the limits of the Due Process Clause).

[58] *Supra* text accompanying notes 49-51.

[59] *See, e.g.*, Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1159-60 (5th Cir. 1983) (recognizing that the jurisdictional inquiry was a question of interpretation of the Texas long-arm statute, but then proceeding to analyze the statute by reference to the Supreme Court's Due Process decision in *Cannon*); *see also infra* text accompanying notes 159-77 (discussing the Fifth Circuit's misapplication of the *Cannon* constitutional analysis to determine the proper interpretation of the Texas statute).

[60] *See* Taylor v. Portland Paramount Corp., 383 F.2d 634, 640 (9th Cir. 1967) (critiquing courts that confuse statutory and constitutional portions of the jurisdiction test by remarking that "[i]n effect, what these courts have done is to abdicate their duty to construe the statutes of their own states"); *see also* CASAD & RICHMAN, *supra* note 57, § 4-1, at 383-86 (critiquing judicial decisions that interpret "enumerated act-type" state

powerful reminder, however, that failure to be methodical about each step of the jurisdictional inquiry can produce confusing results. Even when statutory amenability to suit appears to collapse into the constitutional inquiry, it is still helpful when considering vicarious jurisdiction to keep the question of a defendant's amenability to suit as a separate statutory matter from the question of whether the exercise of jurisdiction satisfies federal constitutional limits on judicial power.[61]

Before undertaking a detailed discussion of vicarious jurisdiction, it may be helpful to note a few distinctions between my discussion and the prevailing scholarship on this issue. In Brilmayer and Paisley's article, the leading academic treatment of the use of veil piercing and other substantive law for jurisdictional purposes, they use the terms "merger," "attribution," and "substitution" to describe the case law in this area.[62] In preferring the phrase "vicarious jurisdiction," I depart intentionally from the terminology and tripartite division favored by Brilmayer and Paisley. This distinction is worth highlighting, first, because to the extent that a number of courts have adopted their terms as the standard lexicon, the imprint of Brilmayer and Paisley's work on the current debate over the boundaries of state court jurisdiction is readily recognizable.[63] Second, the difference between us is more than merely semantic; it suggests a fundamental disagreement on the precedential and policy legitimacy of vicarious jurisdiction assessments.

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long-arm statutes to extend to the limits of due process as "not faithful to the legislative intent").

[61] For an example of scholars arguing that states should not link statutory amenability to suit with due process limits, see Fisch & Kay, *supra* note 54, at 459-62 (discussing problems associated with overconstitutionalizing judicial jurisdiction analysis). *See also* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium*, 7 TUL. J. INT'L. & COMP. L. 111, 113-14 (1999) (explaining the domestic and international costs associated with linking state law and constitutional jurisdictional inquiries).

[62] Brilmayer & Paisley, *supra* note 31.

[63] For decisions citing Brilmayer and Paisley's work, see *Third National Bank v. WEDGE Group Inc.*, 882 F.2d 1087, 1094 (6th Cir. 1989) (Keith, J., concurring); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1099 (C.D. Cal. 2003); *International Bancorp, L.L.C. v. Societe Des Bains De Mer Et Du Cercle Des Estrangers A Monaco*, 192 F. Supp. 2d 467, 477 n.19 (E.D. Va. 2002); *Bradley v. Mayo Foundation*, No. 97-204, 1999 WL 1032806, at *15 (E.D. Ky. Aug. 10, 1999); *Gruca v. Alpha Therapeutic Corp.*, 19 F. Supp. 2d 862, 866 (N.D. Ill. 1998); *In re Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909, 916-18 (S.D. Ohio 1997); *In re Harvard Industries, Inc.*, 173 B.R. 82, 89 (Bankr. D. Del. 1994); *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1464 (D. Del. 1991); *Magnecomp Corp. v. Athene Co.*, 257 Cal. Rptr. 278, 283 (Cal. Ct. App. 1989); *Sternberg v. O'Neil*, 550 A.2d 1105, 1120 n.28, 1126 n.45 (Del. 1988); *Red Sail Easter Ltd. v. Radio City Music Hall Productions, Inc.*, No. 12036, 1992 WL 171420, at *3 (Del. Ch. July 17, 1992); *Schwartz v. Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999).

Brilmayer and Paisley argue that the most cogent way to comprehend this body of jurisdictional decisions is to divide them into three categories, which they label as "attribution," "merger," and "substitution" cases.[64] As they put it:

> First, the legal relationship may be such that it is reasonable to *attribute* the jurisdictional contacts of one party to the other. . . . Second, the legal relationship between two apparently separate entities may be such that in reality the two entities are one; their separate identities are *merged.* The contacts of the first defendant are also the contacts of the second because there is in reality only one defendant. Third, under some circumstances, the party over which there is jurisdiction may be *substituted* for a party over which there is not.[65]

Using the parent-subsidiary relationship as an illustrative example, Brilmayer and Paisley contend that attribution and merger are similar "in that both involve disregarding separate entity status and shifting responsibility for the subsidiary's actions onto the parent. The difference between attribution and merger lies in the extent of this shifting of responsibility."[66] As they explain further:

> Under the attribution theory, only the precise conduct shown to be instigated by the parent is attributed to the parent; the rest of the subsidiary's actions still pertain only to the subsidiary. The two corporations remain distinct entities. If merger is shown, however, all of the activities of the subsidiary are by definition activities of the parent. Merger requires a greater showing of interconnectedness than attribution, but once shown, its scope is broader.[67]

I agree that the term attribution captures well the courts' conduct in these cases, which is why I observed earlier that it may be synonymous with vicarious in this context. It is difficult to see, however, how drawing a distinction between attribution and merger makes sense, much less how it helps to understand the case law in the field. In merger, as in attribution, the jurisdictionally sufficient contacts of one person or entity are attributed to another; in both instances the exercise of jurisdiction is vicarious.[68]

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[64] Brilmayer & Paisley, *supra* note 31, at 2.

[65] *Id.*

[66] *Id.* at 12.

[67] *Id.*

[68] Moreover, I question the idea that merger is more permanent than attribution, a point Brilmayer and Paisley offer as a further distinction between the two types. *See id.* at 12 (discussing the fact that while attribution only applies to "precise conduct shown to be instigated by the parent," merger results in a more enduring connection because "all of the activities of the subsidiary are by definition activities of the parent"). A judicial finding of agency to support attribution or a finding of justified veil piercing

The more fundamental problem with Brilmayer and Paisley's attempt to divide the cases into neat categories is that their objective in doing so is not merely descriptive. Behind their tripartite division lies an assumption that the use of any substantive law, including veil-piercing doctrine, for jurisdictional ends is justified both as a matter of precedent and policy.[69] In short, Brilmayer and Paisley fail to question the validity—under existing law or as a policy matter—of using veil-piercing doctrine to measure the due process limits of jurisdiction. Instead, they suggest that where substantive law would allow the court to pierce the corporate veil, jurisdiction over the absent parent should "follow automatically."[70] Their work, however, does not attempt to build a theoretical justification for incorporating veil piercing into the jurisdictional analysis. Why is it ever appropriate to exercise jurisdiction over an absent parent company based on the allegation that its forum subsidiary was undercapitalized? What do the criteria for veil piercing have to do with the justifications for making the nonresident defendant amenable to suit in the forum? What, for instance, does a failure by the parent to follow corporate formalities, to hold regular shareholder meetings, or to adequately capitalize its subsidiary—to use several commonly cited criteria courts invoke in deciding whether to veil pierce[71]—have to do with the underlying

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to support merger applies only in the specific case in which it is made. Neither finding would extend beyond the bounds of the particular case, except to the extent allowed by res judicata and collateral estoppel principles. Indeed, it is not clear that the use of an agency or veil-piercing conclusion as a predicate for justifying the exercise of personal jurisdiction over an absent defendant could be invoked with preclusive effect, even as a law of the case determination in the same suit. *See, e.g.*, TEX. R. CIV. P. 120a(2) (Vernon 2003) ("No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.").

[69] Brilmayer and Paisley's central criticism of the case law as it has developed in this field is that courts often uphold "quasi-substantive" rules for jurisdictional purposes. Brilmayer & Paisley, *supra* note 31, at 23. A "quasi-substantive rule," by their reckoning, is a rule that is applied to extend the jurisdictional reach of the state court over a nonresident even though the corresponding state substantive rule would not impose liability on a similarly situated resident. *Id.* If the governing substantive state corporate law would not regard a nonresident, D1, as the alter ego of a forum resident, then the state's courts ought not be able to exercise jurisdiction over D1 by applying a less stringent alter ego standard for jurisdictional purposes. *Id.* at 34.

[70] *See id.* at 12 (observing that "there might be reasons such as undercapitalization, to disregard the formal corporate boundaries in which case jurisdiction over the parent would follow automatically").

[71] *See infra* text accompanying notes 268-86 (arguing that the criteria relevant to disregarding the corporate form is almost always unconnected with the harm sustained by the victim or the defendant's relationship with the forum).

reasons why a forum court should be able to exercise jurisdiction over the parent?[72]

Before we can begin to take up these questions, it is necessary to turn our attention first to *Cannon*, which was the earliest occasion in which the Court considered the validity of using veil-piercing law in the jurisdictional test. As we will see, the case has profoundly influenced the shape of modern jurisdictional doctrine.

II. REEXAMINING THE COURT'S DECISIONAL LAW

Conventional wisdom among the lower courts today is that the *Cannon* Court approved—in theory, if not by its actual holding—the use of veil-piercing doctrine in measuring the limits of judicial jurisdiction.[73] In this Part, I challenge this long accepted notion. To develop the argument, however, it is necessary to begin by reviewing the state of jurisdictional doctrine as it existed at the time *Cannon* was decided.

A. *Historical Evolution of a Doctrine*

At the time the Court heard oral argument in *Cannon*, the theory on which the Supreme Court predicated American judicial jurisdiction was the principle of territoriality. This theory, most explicitly articulated by Justice Field in *Pennoyer v. Neff*,[74] effectively limited the exercise of judicial power to state borders in virtually all cases.[75]

Primarily, Justice Field's formulations of the power theory made the jurisdictional rules easy to apply but also terribly inflexible. Recognizing the inherent difficulties of a strict territoriality regime, even

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[72] For similar reasons, I disagree with the necessity of including substitution, as Brilmayer and Paisley have done, to describe a third category of cases. Substitution, according to Brilmayer and Paisley, occurs when jurisdiction is exercised over a defendant whose liability is based on an express statutory authorization. Brilmayer & Paisley, *supra* note 31, at 22-23. The paradigmatic example of substitution is a direct action statute that allows an insurance company to be named as the defendant rather than the insured. Yet, where liability is authorized by a specific statutory mandate, a defendant's amenability to suit in the forum based on that statutory liability is direct and unremarkable. Consequently, the justification for distinguishing substitution cases from merger or attribution cases remains obscure.

[73] *See, e.g.*, *In re* Lupron Mktg. & Sales Practices Litig., 245 F. Supp. 2d 280, 291 (D. Mass. 2003) (noting the "longstanding" common law presumption, presented in the *Cannon* line of cases, of subsidiary independence and how it may be overcome).

[74] 95 U.S. 714, 726 (1878).

[75] *See id.* at 722 ("[T]he laws of one state have no operation outside of its territory . . . and . . . no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.").

the *Pennoyer* court did not adhere unwaveringly to the power theory. After articulating a seemingly absolute rule that made jurisdiction coterminous with the state's territorial limits, Justice Field noted that there were exceptions to the rule.[76] One of the exceptions Field articulated ("[t]o prevent any misapplication of the views expressed in this opinion"[77]) was that the power theory should not be read to trump the state's "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."[78] The state's right to define such matters of status as "marriage" was not the only exception to the strict power theory. The other major exception to the power theory of jurisdiction Field articulated in *Pennoyer* concerned corporations.[79]

Subjecting individuals to suit posed (and poses) no challenge for jurisdictional theory. An individual merely need be present in the physical space of the forum, even if only for a fleeting moment in time, for effective in-state service, both as a traditional basis for exercising jurisdiction and to give formal notice of suit.[80] Dealing with corporate defendants, however, proved more problematic for the power theory.[81] Because in-state service was thought necessary to bring the defendant within the power of the court, it was necessary to fix the place where the corporate entity was located, or "present," in order to decide whether it could be served in the forum. The simple expedient of legislative fiat readily resolved that problem for domestic corporations. In exchange for the privilege of incorporating in the state and receiving whatever benefits and rights are attendant to that chartering, the state could (and may still, even today) decree that the domestic corporation expressly consent to suit in the forum. This is accomplished through the practical tool of requiring the corporation

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[76] *Id.* at 734-35.

[77] *Id.* at 734.

[78] *Id.* at 734-35.

[79] *See id.* at 735 (articulating the exception that a state may require, (and later enforce such contract) a partnership or association within its limits to appoint an agent or representative to receive process).

[80] *See* Burnham v. Superior Court of Ca., 495 U.S. 604, 616-22 (1990) (upholding jurisdiction over a party who made a few short visits to a state for the purposes of conducting business and visiting children); Grace v. MacArthur, 170 F. Supp. 442, 444-47 (E.D. Ark. 1959) (upholding jurisdiction over a defendant served while travelling in an airplane over the forum state's airspace).

[81] *See generally* Philip Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 577-86 (1958) (exploring the inadequacies of the "consent," "presence," and "doing business" theories of jurisdiction over corporate defendants).

to appoint an agent for purposes of in-state service of process[82] or, failing such appointment, to enact a substitute service rule to allow service on a state official in place of personal service on a company representative.[83] In addition to consent, domicile provided another basis on which the power theory could be predicated for domestic corporations since in-state chartering could serve as the corporate analogue to rules that fixed an individual's domicile in the forum.

The sticky wicket for the power theory concerned what to do with the foreign corporation. Unlike the domestic corporation, the foreign corporation's consent (fictional or otherwise) could not be predicated on the grant of a charter, and, for similar reasons, the foreign entity obviously could not be treated as a domiciliary of the forum. The initial notion was to require similar commitments from the foreign corporation by insisting on registration and appointment of an agent in exchange for the right to conduct in-state business (along with an implied-in-law appointment of a state official as agent for service in the event of a failure to comply with these conditions).[84] By at least 1910, however, the state could no longer exclude foreign corporations from conducting interstate business within its borders, thereby invalidating any conditional impositions of express or implied consent to suit.[85]

To fill this gap, the theory of "presence" was developed under which any corporation was deemed to be present, and therefore subject to the court's power, when doing business in the forum.[86] The

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[82] *See, e.g.*, DEL. CODE ANN. tit. 8, § 132 (2002) (requiring every corporation to have and maintain a registered agent in the state for service of process purposes).

[83] *See Pennoyer*, 95 U.S. at 735 ("Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members.").

[84] For example, the Supreme Court in *St. Clair v. Cox*, 106 U.S. 350, 356 (1882), asserted:

> The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated . . . . And such condition and stipulation may be implied as well as expressed.

Id.

[85] *See* Int'l Text Book Co. v. Pigg, 217 U.S. 91, 108 (1910) (holding that a state statute that imposed restrictions on foreign corporations conducting business within the state was an unconstitutional burden on interstate commerce).

[86] *See, e.g.*, Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 583 (1914) (citing St. Louis Southwestern Ry v. Alexander, 227 U.S. 218, 226 (1913), for the proposition that

presence theory, however, proved problematic in practice. How much business must a corporation conduct in a forum in order to be found present within it? The methods of measuring "doing business" proved inexact and uncertain. As Judge Learned Hand once observed, "[i]t is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[87] Even when it could be shown that the necessary quantum of business activity existed, the corporation typically was subject to suit only for claims arising out of the business it conducted in the state and only for so long as the business continued. Once the business ceased, no finding of presence could be sustained.[88]

As the years passed, a growing sense of dissatisfaction with the fictitious nature of the Court's jurisdictional doctrines began to appear both in lower court opinions[89] and academic commentaries.[90] Notwithstanding these concerns, in 1925, the doctrines of consent and presence, though imperfect, provided the only means to avoid the harsh results produced by a strict application of *Pennoyer*'s power theory. A foreign corporation could be compelled to appear in a distant forum only if it had given consent (either express or implied) to suit in the forum or was shown to be present in the forum by virtue of having done business there. Into this breach, the litigants in *Cannon* arrived.

"in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof").

[87] Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 142 (2d Cir. 1930).

[88] *See* Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373, 378-80 (1920) (holding that the presence of a business agent, in compliance with state law, was not enough to establish jurisdiction if that business and the source of the underlying claim were no longer present in the forum state).

[89] *See, e.g.*, Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (blaming the "legal fiction" demanded by personal jurisdiction doctrine for misleading arguments presented to the court).

[90] *See* 2 GERARD CARL HENDERSON, *The Position of Foreign Corporations in American Constitutional Law, in* HARVARD STUDIES IN JURISPRUDENCE 1, 77-100 (1918) (criticizing traditional doctrine denying corporations' presence outside their states of incorporation and the resulting, contradictory doctrine of implied contracts); William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 686-96 (1917) (arguing that presence, not consent, is the true and logical foundation of jurisdiction and should be treated as such); Austin W. Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 889 (1919) (critiquing the Supreme Court's interpretation of a corporation's decision to do business within a state as consent to jurisdiction in that state).

B. *Cotton Sheeting and the Supreme Court*

In February 1922, the Cannon Manufacturing Company (later the Cannon Mills Company) instituted a civil suit for breach of contract in a North Carolina state court against the Cudahy Packing Company.[91] Cannon was a relatively small cotton manufacturing company.[92] By comparison, the Cudahy Packing Company had extensive business operations throughout the country,[93] and even internationally.[94] In 1890, Cudahy, then known as the Armour-Cudahy Co., had $13,471,000 in sales and 1500 employees.[95] In 1920, the company was capitalized at over $25,000,000.[96] A Maine corporation with its

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[91] *See* Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 170 (W.D.N.C. 1923) (recounting the prior history of the case).

[92] John W. Harden, Cannon: The Story of Cannon Mills Company—90 Years of Textile Leadership and Innovation, 1887-1977, at 1 (1974) (unpublished manuscript, on file with author). J.W. Cannon founded the company in 1887 in Mecklenburg County, North Carolina. *Id.* at 4. By the turn of the century, the company had opened a mill on a thirty-four acre site in Kannapolis, North Carolina, the location from which the cotton sheeting in its contract with Cudahy was produced. *Id.* at 5. Its primary business was the manufacture of towels. *Id.* at 6. Although all operations were in North Carolina, the company had opened sales offices in New York to market its products, an unusual practice for a southern textile mill. *Id.* at 5. Cannon Manufacturing was reorganized into the Cannon Mills Company in 1928. *Id.* at 6. In 1986, it was purchased by Fieldcrest Mills which, in turn, was acquired by the Pillowtex Corporation in 1997. *Id.*; Pillowtex Corp., *The Facts About Pillowtex*, *at* http://www.pillowtex.com/pr/PTX_FACT_SHEET.htm (July 2003). After filing for bankruptcy on July 30, 2003, Pillowtex terminated all positions, except twelve hundred, to assist with employee communications, the wind down of its business, and disposition of its assets. Press Release, Pillowtex Corp., Pillowtex Announces Employee Terminations and Plant Closings (July 30, 2003), *at* http://www.pillowtex.com/pr/pr030730.html.

[93] In addition to its corporate affiliates discussed below, Cudahy operated in California, Connecticut, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin. *See* Affidavit of A.W. Anderson at 11, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author); *see also* Cudahy Packaging Co., *Cudahy Packing Company as of 1920*, *at* http://www.ov2000.com/scripophily-corp-pages/Food/Cudahy%20Packing.htm (last visited Mar. 2, 2003) (on file with author) [hereinafter Cudahy Packaging Co., *As of 1920*].

[94] Cudahy Packing Company was also the parent of Cudahy Company, Ltd., which operated in London, England. Deposition of John F. Gearen Jr. at 16, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author) [hereinafter Gearen Deposition]. There is also an ambiguous reference in the deposition to this subsidiary doing business in Australia, but it is never made clear and no other evidence of corporate activity was discovered there. *See id.*

[95] Loyola Univ. Chicago, *University Archives: Michael Cudahy Science Hall*, *at* http://www.luc.edu/depts/archives/cudsci.html (last visited Jan. 15, 2003).

[96] *See* Brief of Plaintiff in Error at 6, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (describing the corporate structure of the Cudahy Packing Co.) (on file with author) [hereinafter Brief of Plaintiff].

principal place of business in Chicago, Cudahy was also the corporate parent of a number of wholly owned subsidiaries throughout the United States. These subsidiaries included the Cudahy Packing Company of Alabama, the Cudahy Packing Company of Nebraska, and the Cudahy Packing Company of Louisiana, Ltd.[97] Along with Swift, Armour, Morris and Wilson, Cudahy was one of the "Big Five" packing firms in the nation in the first part of this century.[98] This moniker was indelibly linked to the company following the Federal Trade Commission's investigation of the industry and the 1920 Packer Consent Decree, which all five signed.[99] As a prominent player in an industry exposed by Upton Sinclair in *The Jungle*[100] for its inhumane and villainous practices, Cudahy was a corporate Goliath that stood in stark contrast to the more modest North Carolina cotton manufacturer.

The subject of the suit between Cannon and Cudahy concerned a contract signed in 1919, in which Cannon agreed to supply cotton sheeting for use in Cudahy's meatpacking operations.[101] Cotton sheeting was used as a shroud for wrapping the beef and pork products that packers like Cudahy shipped.[102] After the animals had been slaughtered, the cotton shroud was pulled tight over each carcass to smooth out the fat and make it more cosmetically appealing.[103] If the carcass had a yellow tint, resulting from the animal's diet of primarily oats or wheat, the cotton shroud also could be dipped in warm salt water before being placed on the meat to whiten its appearance.[104]

The 1919 contract was not the first business deal between the two parties. For several years prior to this agreement, Cannon had supplied cotton sheeting to Cudahy pursuant to several short-term supply contracts. Each of these contracts bound Cudahy to fulfill all of its cotton sheeting needs, within a specified minimum and maximum range, from Cannon. On every prior occasion, Cudahy had

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[97] *See id.*; Cudahy Packing Company, *As of 1920*, *supra* note 93 (chronicling Cudahy's large operations).

[98] KENNETH M. MATHEWS JR. ET AL., U.S. DEP'T OF AGRIC., U.S. BEEF INDUSTRY: CATTLE CYCLES, PRICE SPREADS, AND PACKER CONCENTRATION 9 (Apr. 1999), *available at* http://www.ers.usda.gov/publications/tb1874/tb1874e.pdf (last visited Jan. 15, 2003).

[99] *Id.*

[100] UPTON SINCLAIR, THE JUNGLE 3-41 (Viking Press 1950) (1905).

[101] Plaintiff's Complaint at ¶¶ 4-5, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author) [hereinafter Plaintiff's Complaint].

[102] *Id.* ¶ 4.

[103] Interview with Milton Freedman, Freedman Packing Company (Feb. 26, 2002) (on file with author).

[104] *Id.*

purchased the maximum quantity of the cotton fabric that Cannon committed to furnish.[105] The 1919 contract contained terms similar to those of the earlier contracts. It obligated Cudahy to purchase "its entire requirements of cotton fabric" from Cannon, not to exceed 750,000 yards from January through September 1920.[106] On this occasion, however, Cudahy apparently no longer desired to purchase the maximum quantity of cotton sheeting. Cannon alleged in its original complaint that Cudahy had ordered and paid for less than 50,000 yards before it refused to accept any further shipments.[107] Cannon sought damages in the amount of $49,000.[108]

To effectuate service on Cudahy, Cannon delivered a summons to the deputy sheriff of Mecklenburg County to be served on Frank H. Ross of Charlotte, North Carolina.[109] Ross was an employee of the subsidiary, Cudahy Packing Company of Alabama, but he held no position with the parent company, the only named defendant in the action.[110] Cudahy Packing Company of Alabama had a branch office in Charlotte, North Carolina, and was qualified to do business there.[111] Ross was the designated agent for service of process in North Carolina.[112] On the same day the deputy sheriff received the summons, he served it on Ross.[113] In its original complaint, Cannon averred that Ross was the right person to serve because Cudahy was doing business

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[105] Plaintiff's Complaint, *supra* note 101, ¶ 4.

[106] *Id.* ¶ 5.

[107] *Id.* ¶ 7.

[108] *Id.* ¶ 9(3).

[109] *Id.* at 2.

[110] *See id.* (identifying Ross as the "process agent of Cudahy Company of Alabama"). It is notable that the plaintiff apparently concluded it lacked any legal claim against the subsidiary. Therefore, it did not name the Alabama company as a codefendant. For a discussion of the principle of a liability predicate before jurisdiction may be exercised, see *infra* text accompanying notes 307-25.

[111] Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 170, 172-73 (W.D.N.C. 1923); Gearen Deposition, *supra* note 94, at 18.

[112] *Cannon Mfg. Co.*, 292 F. at 170.

[113] *Id.* We may presume he was served in Mecklenberg County, but the return of service does not directly confirm this fact. If he had been served in North Carolina, but outside of the Western District, a nice procedural problem might have arisen. As Stephen Burbank has noted, "[p]rior to the Federal Rules, and except where otherwise provided by Act of Congress, the territorial jurisdiction of the federal courts in *in personam* actions was restricted to the district of which a defendant was an inhabitant or in which he could be found." Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1172 n.673 (1982). It is unclear whether the federal court would have regarded the in-state, but outside of the district, service pursuant to the state service statute as insufficient to confer territorial authority over the defendant upon removal of the case to district court.

in North Carolina "directly and through [its] subsidiary corporation."[114] Although North Carolina had a statute authorizing service on the secretary of state for any corporation "having property or doing business" in the state when the corporation failed to appoint an officer or agent upon whom process could be served,[115] Cannon chose not to invoke that statutory provision.[116]

Following service on Ross, the litigation process moved quickly. Only two weeks after service of the lawsuit, lawyers for Cudahy filed a special appearance objecting to the exercise of personal jurisdiction by the North Carolina court and, simultaneously, removed the suit to federal court.

When Cannon instituted this proceeding against it, Cudahy was certainly no stranger to litigation. Indeed, Cudahy had already been a party in a number of cases before the United States Supreme Court.[117]

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[114] Plaintiff's Complaint, *supra* note 101, ¶ 3.

[115] *See* Lunceford v. Commercial Travelers' Mut. Accident Ass'n, 129 S.E. 805, 805-07 (N.C. 1925) (citing the North Carolina long-arm statute extant at the time *Cannon* was decided, N.C. GEN. STAT. § 1137 (1901), and upholding service on a foreign corporation through service on the secretary of state where defendant insurance company was deemed to be "doing business" in the state).

[116] We can only speculate as to the reasons why Cannon did not try to serve Cudahy through the secretary of state based on an assertion that Cudahy itself was "doing business" in North Carolina by virtue of the cotton sheeting supply contract it had entered. Cannon may have believed it was unlikely that the court would find Cudahy had been doing sufficient business in North Carolina to warrant the inference that it was present for jurisdictional purposes. Only two years earlier, in *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), the Court had ruled that intermittent visits to a state to make purchases by a foreign corporation, "even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State." *Id.* at 518. Of course, both the 1919 supply contract, as well as the earlier supply contracts between Cannon and Cudahy, suggest a much higher and continuous level of business involvement by Cudahy in North Carolina than the handful of visits by the Oklahoma haberdasher to New York in *Rosenberg Bros.* On the other hand, to the extent that the business done by Cudahy under the contract had ceased, Cannon may have believed the Court's decisions foreclosed the argument that Cudahy was "present" in the state at the time of service. *See* Chipman Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373, 378-80 (1920) (holding that there was no jurisdiction over the defendant when it had "removed from" the state prior to service). If Cannon did overestimate the ruling in *Rosenberg Bros.*, it certainly would not be the last time the short opinion would be asked to carry more than its own weight. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984) (citing *Rosenberg Bros.* for the proposition that "purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction" but failing to distinguish the specific jurisdiction nature of the earlier case from the general jurisdiction inquiry on which the majority appeared to base its decision).

[117] *See* Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923) (affirming a compensation award to plaintiff's estate in a worker's compensation action); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921) (affirming the Fourth Circuit's

Its decision to remove the action to federal court, in particular, bespoke a familiar strategy for litigation-savvy corporate defendants who, like Cudahy, were sued outside of their state of incorporation or principal place of business. In the early 1920s, during the heyday of progressive politics, the federal courts were commonly perceived to be more favorable to business interests, and diversity jurisdiction served as the foreign corporation's ticket into the federal courthouse.[118]

Before the federal district court, Cudahy reasserted its jurisdictional objections. Specifically, the company argued that the North Carolina court lacked jurisdiction over it because Cudahy never had been served with process and that neither Ross nor anyone else ever had been designated as its agent for service in the state.[119] While conceding that its Alabama subsidiary was present and doing business in North Carolina, Cudahy argued that because it was not and had never been present in the state, it was not subject to jurisdiction there.[120]

At the hearing before the district court, Cannon argued that the sole question to be explored in deciding the jurisdictional issue was whether Cannon's assertion that the separate corporate identity of the Alabama subsidiary should be disregarded for jurisdictional purposes was correct.[121] If the two corporations were regarded as one and the same, even Cudahy conceded that service on the Alabama subsidiary would then amount to effective service on the parent.[122] Thus, by the time that the district court came to write its opinion, the central legal issue in the case was

> whether there is such an identity between the Alabama corporation and the Maine corporation as that the Maine corporation was present and doing business in North Carolina . . . and whether, therefore, service upon the process agent of the Alabama corporation is equivalent to

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reversal of a judgment for the plaintiff under the Sherman Antitrust Act); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918) (finding that a Minnesota tax on in-state property of foreign freight-line companies was not a violation of the commerce clause); Armour Packing Co. v. United States, 209 U.S. 56 (1908) (affirming a conviction for violations of the Elkin's Act, which made it unlawful to ship interstate commerce below set rates).

[118] *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 153 (2000) (noting that businesses preferred federal courts because of their perceived corporate bias).

[119] Petition to Set Aside Summons and to Dismiss at 10, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author) .

[120] *Id.*

[121] Cannon Mfg. Co. v. Cudahy Packing Co., 292 F. 169, 171 (W.D.N.C. 1923).

[122] *Id.*

> service made upon the Maine corporation, and is effective to bring the latter within the jurisdiction of this court.[123]

Cannon's decision to focus on the veil-piercing argument as the basis for jurisdiction is particularly fascinating considering the state of the substantive corporate law at the time. The prevailing theory throughout the nineteenth century regarded a corporation, famously described as an "artificial being" by Chief Justice Marshall,[124] as possessing an existence separate from its owners and operators.[125] This entity theory of business corporations was plausibly supported in these earlier years of our history because the only accepted form of organization, as Phillip Blumberg has observed, was a "simple corporate structure."[126] Until the New Jersey legislature in 1888 granted permission for any corporation chartered in the state to own stock in another corporation, neither parent-subsidiary holding companies nor other intercorporate arrangements could exist anywhere in the nation,[127] except, on the rare occasions where a special charter granted a particular company the specific right to own stock in another.[128]

As the old proscriptions on corporate stock ownership loosened, new questions arose concerning public regulation of business and legal accountability of corporate owners. One of the most important developments in the substantive law of corporations was the recognition of a rule of limited liability for corporate shareholders.[129] This recognition, however, was slow in coming. Consensus among the

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[123] *Id.*

[124] Trs. of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

[125] *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting in part) (noting that the rise of the corporate mechanism was originally feared in the nineteenth century because of concern that a corporate entity, with its "absorption of capital" and "perpetual life," would "bring evils" such as "encroachment upon the liberties and opportunities of the individual" and "the subjection of labor to capital").

[126] BLUMBERG, *supra* note 19, at 3.

[127] *See Liggett*, 288 U.S. at 556 n.32 (Brandeis, J., dissenting in part) ("New Jersey was the first state to confer the general power of intercorporate stock holding.").

[128] *See* William Randall Compton, *Early History of Stock Ownership by Corporations*, 9 GEO. WASH. L. REV. 125, 125-32 (1940) (detailing the history of stock ownership by corporations prior to the 1888 New Jersey statute); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 520 (2d ed. 1985) (discussing the evolution of holding companies in the United States).

[129] *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1.01 (2003) (noting that while many in the early twentieth century viewed limited liability for shareholders as extremely important, some current scholars disagree as to its significance).

states on a default rule of limited liability for shareholders did not exist until the dawning of the twentieth century.[130]

When the *Cannon* case arrived at the Court, the doctrinal boundaries of limited liability for corporate shareholders were hardly settled, and the doctrinal exceptions to the rule were still being shaped.[131] One striking illustration of the developing state of corporate law is that the now-familiar phrase, "piercing the corporate veil," the principal exception to the rule of limited liability, did not even appear in print until Maurice Wormser's article in 1912.[132] Furthermore, Professor Wormser's seminal book on the subject, *Disregard of the Corporate Fiction and Allied Corporate Problems*, came out two years *after* the *Cannon* case was decided.[133] It is also notable that Judge Benjamin Cardozo penned his famous description of the doctrine, as "enveloped in the mists of metaphor" in 1926, one year after the Court's decision in *Cannon*.[134] To be sure, there were a number of cases that Cannon cited in its brief in which courts disregarded the separate corporate form.[135] Cannon's decision to base its principal argument for upholding service on this inchoate doctrine is particularly difficult to explain considering that no court had ever approved using the substantive law for jurisdictional purposes.[136]

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[130] *See* Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability*, 102 COLUM. L. REV. 1203, 1211 (2002) (finding that "limited corporate shareholder liability was far from fully established until the early part of the twentieth century").

[131] *See* Morton J. Horowitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 208 (1985) ("[T]he distinction between the liability of the 'members' of a corporation and a partnership, so clear to modern eyes, was still regarded rather as a matter of degree than of kind throughout the nineteenth century.").

[132] I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912).

[133] I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS 42-85 (1927).

[134] Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

[135] *See, e.g.*, Brief of Plaintiff, *supra* note 96, at 10 (citing *In re* Watertown Paper Co., 169 F. 252, 256 (2d Cir. 1909) to show that the district court found only two exceptions to the rule of separate corporate form). The enumerated exceptions are:

> (1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation.

169 F. at 256.

[136] The only case Cannon cited in its brief in which the separate corporate identity was ignored for the purpose of treating service on one entity as service on another was *Alley v. Bessemer Gas Engine Co.*, 262 F. 94 (5th Cir. 1919). Brief of Plaintiff, *supra* note 135, at 54. Yet, despite Cannon's characterization of *Alley* as support for the proposition that "the doing of business by a foreign corporation in a State through a

Ultimately, Cannon's decision to pursue this novel argument may reflect nothing more than its belief that there were no other arguments to justify the suit against Cudahy in its home forum. Unable to demonstrate that Cudahy was doing sufficient business in North Carolina to justify service through the secretary of state, Cannon was forced to argue that service on its subsidiary was sufficient to compel the parent to appear under penalty of default.

After Cudahy raised its jurisdictional objection, the district judge allowed the parties to conduct discovery. Cannon immediately scheduled depositions of two corporate representatives: John F. Gearen, Jr., an assistant office manager of the parent company, who was also an officer of the subsidiary,[137] and Frank Ross, the subsidiary's designated agent for service. Although the record includes substantial evidence to suggest a close corporate relationship, a review of the testimony and corporate documents clearly reveals considerable efforts to keep the business activities of the parent distinct from the Alabama subsidiary, as well as from all of the other subsidiaries. Mr. Gearen testified, however, that the Alabama subsidiary and Maine parent shared two common officers.[138] Mr. Gearen himself served not only as assistant office manager and assistant treasurer for Cudahy but also as the assistant treasurer for the Alabama subsidiary.[139]

The headquarters of the Cudahy Packing Company of Alabama were not in Alabama at all but were located at the same address as Cudahy's offices in Chicago, Illinois: 111 West Monroe Street.[140] The subsidiary's branch offices sent many reports to its headquarters in

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subsidiary constitutes such a doing business as to make it amenable to process," *id.*, the case was not as persuasive an authority as Cannon suggested. The primary issue in *Alley* was not the validity of service of process but whether the defendant was absent from the state for purposes of tolling the statute of limitations under Texas law. 262 F. at 95. Additionally, the defendant in *Alley* was a Pennsylvania corporation that employed two local salesmen in Texas and apparently one of them was served with process while in the forum. *Id.* at 96. By contrast, Cannon conceded that Cudahy had no local agent in North Carolina, unless Ross was deemed to be its agent. It is not surprising that although Justice Brandeis carefully reviewed several other decisions that Cannon cited in its brief, he apparently gave little credence to Cannon's reliance on *Alley*. His handwritten memoranda to the file contains no reference to the circuit court of appeals' decision. Memorandum by Justice Brandeis, Cannon Mfg. Co. v. Cudahy Packing, 267 U.S. 333 (1925) (No. 255) (on file with author).

[137] Gearen Deposition, *supra* note 94.

[138] *Id.* at 16-17.

[139] *Id.*

[140] *Id.* at 19.

Chicago, of which at least some were mailed only to "Cudahy, 111 West Monroe Street, Chicago, Illinois."[141]

Beyond these facts, however, the evidence suggested a concerted effort by Cudahy to maintain a separate corporate identity for the Alabama subsidiary. Especially significant in the district court's view was the careful accounting efforts employed to treat the two as distinct entities.[142] Moreover, the record indicated, as the district court pointed out, that the Alabama company had been formed in 1898 and "was not organized by or at the instance of the Maine corporation, which was not formed until 1915."[143] After an extensive review, the district court ultimately concluded that, for purposes of service of process, "the Alabama corporation is a separate and distinct legal entity."[144]

Perhaps the most intriguing portion of the district court's opinion was the distinction it drew between an exception to corporate separateness for substantive liability purposes and for purposes of service of process:

> If the issue I am passing upon were a question of preventing fraud through a corporate fiction or of preventing an escape from just liability, the court would have little trouble in holding that there is such identity between the two corporations as to enable the court to prevent fraud; but while the courts generally have held that they will look through corporate fictions to prevent such fraud or to enforce just liability, yet I know of no case where it has been found that a separate legal corporate entity can have process served upon it and such process take the place of process on some other separate legal corporate entity.[145]

The district judge never explained how the evidentiary record could appropriately support ignoring the limited liability protections of the corporate form for substantive purposes but not for service of process. One surmises that the court was led to its conclusion by its view of the prevailing "power" theory of jurisdiction, which insisted that jurisdiction required physical presence in the forum. From the premise that the Maine and Alabama companies were "separate legal entities" followed the logical conclusion under the then-governing

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[141] *Id.*

[142] *See* Cannon Mfg. Co. v. Cudahy, 292 F. 169, 175 (W.D.N.C. 1923) (observing that "[u]nder the system of bookkeeping maintained, it is absolutely possible to trace every item which is shipped by the Maine corporation upon the order of the Alabama corporation").

[143] *Id.*

[144] *Id.* at 176.

[145] *Id.*

territoriality principles that the latter was not present in the forum and, therefore, not amenable to suit in the forum.[146]

C. *Justice Brandeis's Opinion and the Legacy of* Cannon

Following its dismissal of the suit, the district court certified the question of jurisdiction for direct appeal to the Supreme Court. This form of direct appeal was authorized by the Evarts Act of 1891[147] and made review of the certified question mandatory.[148] Similar to its argument at the district court level, Cannon defended the in-state service on the Alabama subsidiary's agent as sufficient to establish jurisdiction over Cudahy on a theory of vicarious jurisdiction.[149] Cannon again argued that substantive law principles of corporate disregard should be incorporated into the jurisdictional analysis so as to allow

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[146] *Id.* at 177.

[147] Ch. 517, 26 Stat. 826 (1891).

[148] The Evarts Act of 1891 marked two important changes in federal appellate practice. It imposed a new, intermediate level of judicial review by creating the circuit court of appeals. *Id.* § 2. The Evarts Act further reduced the appellate jurisdiction of the Supreme Court by authorizing the statutory writ of certiorari, which gave the Supreme Court discretion to accept or decline review of intermediate circuit court of appeals decisions across a wide range of cases. *Id.* Direct review of district court decisions to the Supreme Court was still available, however, under section 5 of the Evarts Act. *Id.* § 5. Among other grounds, section 5 authorized direct review "[i]n any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." *Id.* It was on this basis that the litigants in *Cannon* obtained a writ of error for direct review by the Supreme Court, bypassing intermediate review at the circuit court of appeals stage and avoiding the need for seeking discretionary review by way of certiorari. With the district court's certification of the question of jurisdiction, the case fell squarely within the first ground of direct appeal authorized by section 5 of the 1891 Act. *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 334 (1925) (referencing section 238 of the Judicial Code of 1911, which had codified the direct appeal grounds of section 5 from the 1891 Evarts Act and noting that "[t]he case is here under [section] 238 of the Judicial Code, the question of jurisdiction having been duly certified"); *see also* Act of Sept. 14, 1922, ch. 305, 42 Stat. 837 (amending the Judicial Code of 1911, ch. 231, 36 Stat. 1087, to add section 238). One other historical note bears mentioning. The Judges' Bill of 1925, which coincidentally was passed by Congress only two weeks after the oral argument in *Cannon*, narrowed the range of cases for which direct review was authorized and, at the same time, expanded the Supreme Court's discretionary review authority. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 938-39 (amending Judicial Code of 1911, ch. 231, 36 Stat. 1087). If it had been applicable, the Judges' Bill would have precluded direct review of the district court's decision in *Cannon* by eliminating direct appeal by writ of error after district court certification of a question of jurisdiction. For a recent, general discussion of the 1891 Evarts Act and the Judges' Bill of 1925, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).

[149] *Cannon*, 267 U.S. at 335.

the court to attribute the forum contacts of the subsidiary, which was present in the forum, to the parent.[150] As its brief framed the sole question for the Court's review:

> [t]he issue which developed between the parties in the court below, and which still remains, was and is whether there was at the time of the service of the summons such an identity between the Alabama corporation and the defendant as that the defendant was present and doing business in North Carolina because the Alabama corporation was present and doing business there.[151]

Writing for a unanimous court, Justice Brandeis found no basis for treating the parent and its subsidiary as a single entity for purposes of service of process and readily affirmed the district court's order quashing service.[152] It is unclear, however, why the Court was unwilling to attribute the forum presence of the Alabama entity to the defendant. Justice Brandeis deserves a fair share of the blame for encouraging misconceptions of his reasoning to flourish. His short opinion (only four pages in the United States Reports) dispatching the plaintiff's

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[150] *Id.* Cannon advanced a second argument to the Supreme Court to support service that it had not raised in the court below. In addition to its main argument that service on the subsidiary was sufficient to bind the parent because the subsidiary was a mere instrumentality or agent of the parent, Cannon also argued that the subsidiary corporation had no legally recognized existence because Alabama law did not recognize a "corporation sole." *Id.* at 337. In 1925, many states, including Alabama, statutorily required that a corporation be owned by three or more persons. *Id.* A corporation owned by less than three, a "corporation sole," offended the statutory minimum and, according to Cannon, ceased to exist under state law. *Id.* Cannon cited a number of state court decisions addressing the question of how to treat a corporation that was owned by less than the requisite minimum number of shareholders, though, notably, none involved the question of service of process. *See* Brief of Plaintiff, *supra* note 96, at 36-37 (citing, inter alia, First Nat'l Bank v. Winchester, 119 Ala. 168 (1898)). In his opinion for the Court, Justice Brandeis summarily dismissed Cannon's argument that by purporting to be a corporation sole, the subsidiary corporation ceased to exist and, therefore, service on it amounted to service on the parent. *Cannon*, 267 U.S. at 337-38. The argument's deficiency was that it was not clear under Alabama law what consequences flowed from falling below the statutory minimum. *Id.* Brandeis held:

> It may be that upon the concentration of its stock in the hands of the defendant, the franchise of the Alabama corporation became subject to forfeiture in a judicial proceeding by the State; or that thereby its status was reduced from a corporation *de jure* to one *de facto*. But whatever might be other legal consequences of the concentration, we cannot say that for purposes of jurisdiction, the business of the Alabama corporation in North Carolina became the business of the defendant.

Id.

[151] Brief of Plaintiff, *supra* note 96, at 3. An interesting fact about the briefing in this case is that the defendant filed its brief before the plaintiff, even though it was the plaintiff who was seeking to reverse the lower court's decision.

[152] *Cannon*, 267 U.S. at 336-37.

assignments of error has lent itself to varying interpretations. One of the central uncertainties of the case is whether, in the Court's view, the problem with in-state service was constitutional in nature; that is, whether it was an infringement of Cudahy's due process rights to be subject to the jurisdiction of a court in North Carolina. Justice Brandeis appeared to expressly disavow any constitutional basis in the decision. "No question of the constitutional powers of the State, or of the federal Government, is directly presented."[153] Yet, what could it mean that no constitutional question was involved in the case? The answer is certainly not self-evident, since it seems that the prevailing constitutional theory of jurisdiction—the power theory—*was* essential to the outcome. Lacking any agent "present" within the forum, Cudahy presumably was beyond the territorial reach of the courts in North Carolina; that is, beyond what Justice Rutledge in another case would refer to as "the utmost reach" of legislative power.[154]

This confusion regarding the constitutional basis, if any, for the holding in *Cannon* remains a subject of much uncertainty among lower federal and state courts. Yet, despite the divisions over the continuing vitality of the decision in *Cannon*, the conventional wisdom among the lower courts today is that the *Cannon* Court approved the use of veil piercing for jurisdictional purposes.[155] To be sure, the correct meaning of *Cannon* is a question on which courts are sharply divided. Academic commentators have traditionally focused on the differing interpretations of *Cannon* among the lower courts to mark the boundary lines of a number of separate spheres. Which courts continue to treat *Cannon* as controlling authority?[156] Which purport to follow *Cannon*, but in fact have retreated from *Cannon*'s rigid rule?[157] Which have rejected *Cannon*'s relevance to the constitutional inquiry

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[153] *Id.* at 336.

[154] United States v. Scophony Corp. of Am., 333 U.S. 795, 804 n.13 (1948).

[155] *See, e.g.*, Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1160 (5th Cir. 1983) (citing *Cannon* "for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other" but where the parent controls the internal business operations and affairs of the subsidiary, jurisdiction is proper); Savage v. Scripto-Tokai Corp., 147 F. Supp. 2d 86, 93 (D. Conn. 2001) (noting that the *Cannon* rule prohibits jurisdiction over a parent merely because it owns a subsidiary in the forum state so long as there is a real separation between the entities).

[156] *See* BLUMBERG, *supra* note 19, at 209 n.17 (citing courts which continue to uphold *Cannon* as controlling); *see also* BORN, *supra* note 25, at 154 (dividing cases into similar categories).

[157] *See* BLUMBERG, *supra* note 19, at 210-11 (citing cases in which courts have retreated from the *Cannon* rule); *see also* BORN, *supra* note 25, at 155 (describing various courts' different and flexible interpretations of *Cannon*).

and which have concluded that the decision has been overruled entirely?[158] While it is clear that there are differences in how *Cannon* is regarded, these differences obscure a less apparent point about the lower court decisions in this area. That is, if we look past the surface disagreements over whether *Cannon* remains good law, we will discover that these apparent differences mask a fundamental consensus over the exercise of indirect jurisdiction as a measure of state court power. Put another way, focusing on the differences among courts over whether or to what extent *Cannon* remains controlling authority misses a larger truth: that the predominant view among courts is that veil-piercing law may be invoked to justify indirect exercises of state court power.

For example, *Hargrave v. Fibreboard Corp.*,[159] the leading Fifth Circuit case on jurisdictional veil-piercing, is illustrative of those decisions that continue to cite *Cannon* approvingly and thereby continue to accept the validity of using veil-piercing for jurisdictional purposes. Nicolet, Inc., the named defendant in *Hargrave*, acquired some manufacturing facilities and other assets of a Pennsylvania asbestos company, Keasbey & Mattison Co., in 1962.[160] Soon after the asset acquisition, Keasbey & Mattison formally dissolved.[161] After two different asbestos lawsuits (consolidated by the court as the *Hargrave* action), Nicolet filed third-party complaints against Keasbey & Mattison's corporate parent, Turner & Newall, Ltd. (T & N), a publicly traded English company headquartered in Manchester, England. Prior to Nicolet's purchase of the manufacturing facilities, T & N had been sole corporate parent of Keasbey & Mattison.[162]

Among other grounds for dismissal of the impleader action, T & N challenged the exercise of personal jurisdiction over it as unauthorized by the terms of Texas's long-arm statute and as constitutionally excessive.[163] Although Nicolet subsequently sought to assert (too late, however, for the Fifth Circuit to consider the argument) that T & N had sufficient direct contacts with Texas, the central ground upon which the court maintained exercise of jurisdiction was "not upon the direct contacts of T & N *eo nomine*, but rather upon T & N's doing of

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[158] *See* BLUMBERG, *supra* note 19, at 209 (citing cases in which courts have rejected the *Cannon* rule); *see also* BORN, *supra* note 25, at 155 (citing different approaches to interpreting *Cannon*).

[159] 710 F.2d 1154 (5th Cir. 1983).

[160] *Id.* at 1156.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 1157.

business in Texas by and through its subservient captive subsidiary, the Keasbey-Mattison Company."[164] The court then framed the jurisdictional inquiry as two parts: Nicolet must first show that Keasbey & Mattison was subject to jurisdiction in Texas; and then, having established sufficient contacts, it must demonstrate that they should be imputed to T & N.[165]

The Fifth Circuit began its jurisdictional analysis by emphasizing the statutory nature of the initial inquiry; it would only be necessary, the court said, to reach the constitutional due process question after establishing T & N's amenability to service under the state long-arm statute.[166] This aspect of the court's decision, by itself, makes the case worth studying closely. The decision to focus the jurisdictional analysis first on the defendant's statutory amenability is certainly curious, given that both state and federal courts interpreted the Texas long-arm statute to extend as far as the limits of due process under the Fourteenth Amendment.[167] Normally, linking the long-arm statute to the constitutional maximum is thought to collapse the question of legislative intent into the *International Shoe* test. Why, then, did the court bother with assessing the statutory predicate? The explanation pertains to the nature of the plaintiffs' jurisdictional allegations.

Earlier circuit decisions that suggested the necessity of requiring the plaintiff to prove a statutory basis in indirect jurisdiction cases, even though the state long-arm had been interpreted to go to the full extent of due process, drove the court's focus on T & N's amenability to service under state law.[168] The rationale of these cases was that because of the unique nature of a vicarious jurisdiction assertion, the jurisdictional nexus depended upon an underlying substantive

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[164] *Id.* at 1159 n.3.

[165] *Id.* at 1159.

[166] *Id.* The court stated that:

> In deciding whether the state jurisdictional statute confers jurisdiction over a non-resident defendant in a diversity suit, it must be determined that (1) the defendant is in fact amenable to service under the statute (state law of the forum controls this question), and (2) if the state statute has been complied with, then federal law must be applied to determine whether assertion of jurisdiction over the defendant comports with due process.

Id. at 1158-59 (quoting Walker v. Newgent, 583 F.2d 163, 166 (5th Cir. 1978)).

[167] *See id.* at 1161 n.4 (noting that both state and federal courts had pronounced the Texas long-arm statute to authorize the assertion of personal jurisdiction over nonresidents to the limits of the due process clause).

[168] *See, e.g.*, Prod. Promotions, Inc. v. Cousteau, 495 F.2d 483, 491-92 (5th Cir. 1974) (recognizing that Texas's long-arm statute was intended to reach the limits of federal due process requirements but nonetheless requiring a prima facie showing of facts upon which jurisdiction is statutorily based).

allegation and the plaintiff's burden was to offer at least prima facie evidence of the underlying principal-agent relationship to come within the terms of the long-arm statute.[169]

One of the great ironies of the decision in *Hargrave*, however, is that despite the seemingly careful attention paid to the language of the long-arm, the court nonetheless proceeded to measure T & N's statutory amenability to service by citing *Cannon* and its progeny, apparently blind to the irrelevance of these federal cases to deciphering the meaning of the state long-arm statute.[170] In this regard, *Hargrave* illustrates a common failure among courts to recognize the source-of-law issue implicated in the evaluation of many vicarious jurisdiction arguments.[171]

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[169] *Id.* at 492. Relatedly, there is disagreement among the courts on whether the fiduciary shield doctrine, which provides that corporate officers are not amenable to suit in a forum if their actions are taken on behalf of the corporation, is a limitation on the reach of a forum's long-arm statute or on federal due process analysis. *Compare* Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 902 n.3 (2d Cir. 1981) ("The fiduciary shield doctrine is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long-arm statute."), *with* Saktides v. Cooper, 742 F. Supp. 382, 385 (W.D. Tex. 1990) ("[T]he fiduciary shield doctrine [is] an important sub-issue under a due process analysis."). The Supreme Court did not have to address the proper place for the fiduciary shield doctrine in the law of personal jurisdiction in its decision in *Calder v. Jones*, 465 U.S. 783 (1984), because the California statute expressly extended to the due process limit. *Id.* at 786 n.5. If, however, the state long-arm statute enumerates specific kinds of conduct that trigger jurisdictional amenability, analysis of the fiduciary shield doctrine implicates an a priori choice of law determination. In analysis of the fiduciary shield doctrine, the court in *Auto Wax Co. v. Marchese*, No. 3:01-CV-2571-M, 2002 U.S. Dist. LEXIS 12758 (N.D. Tex., July 15, 2002), wrote:

> If the fiduciary shield doctrine operates as a limitation on a state's long-arm statute, then the fiduciary shield law of that state's courts should be applied. In contrast, if the fiduciary shield doctrine finds its basis in federal due process analysis, the Court should look to federal common law relating to the doctrine.

Id. at *8-9.

[170] *See* Hargrave v. Fibreboard, 710 F.2d 1154, 1160 (5th Cir. 1983) (noting that "*Cannon* . . . stands for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other").

[171] *See, e.g.*, De Castro v. Sanifill, Inc., 198 F.3d 282, 283-85 (1st Cir. 1999) (failing to identify whether the statutory or constitutional portion of the jurisdictional inquiry was at issue); Flip Side Prods., Inc. v. Jam Prods., Ltd., No. 82 C 3684, 1990 U.S. Dist. LEXIS 15411, at * 13 (N.D. Ill. Nov. 8, 1990) (upholding service on agent of affiliated entity and observing that "[i]t makes little sense to insist on separate service of individuals and corporations that are held as a matter of law to be alter egos of another corporation"); *see also* United States v. Toyota Motor Corp., 561 F. Supp. 354, 361 (C.D. Cal. 1983) (finding service of process requirements satisfied after more exhaustive jurisdictional analysis); BLUMBERG, *supra* note 19, at 209 (observing that "in some cases,

Seemingly unconcerned that Justice Brandeis's decision bore no weight on the question of the Texas legislature's intent in its long-arm statute, the *Hargrave* court began its substantive analysis of jurisdiction by quoting a key finding and passage from the Court's opinion in *Cannon* regarding the relationship between the parent and subsidiary in that case: "[T]he corporate separation, though perhaps merely formal, was real. It was not pure fiction."[172]

After highlighting this vital language, the court in *Hargrave* concluded that *Cannon* "stands for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other."[173] Even though *Cannon* required that this initial presumption of corporate separateness be honored, *Hargrave* quickly cautions that the case does not mandate that courts apply the presumption inflexibly:

> It has long been recognized, however, that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent "does business" in a jurisdiction through the local activities of its subsidiaries. . . . The rationale for such an exercise of jurisdiction is that the parent corporation exerts such domination and control over its subsidiary that "that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction."[174]

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it is not entirely clear whether the court is discussing amenability to service (jurisdiction) or the validity of service of process").

[172] *Hargrave*, 710 F.2d at 1160 (quoting Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337 (1925) (alteration in original)). This passage from *Cannon* is cited with great frequency by other courts as well. *See, e.g.*, Richard v. Bell Atl. Corp., 946 F. Supp. 54, 69 (D.D.C. 1996) (quoting the passage and ultimately concluding that "[a]s in *Cannon*, the plaintiffs herein have made no showing that the corporate separation between [the defendant parent corporation] and its subsidiaries is 'pure fiction'"). Courts cite the passage from *Cannon* not only in the context of measuring judicial jurisdiction, but also in the context of assessing diversity for subject matter jurisdiction purposes. In *Schwartz v. Electronic Data Systems, Inc.*, 913 F.2d 279 (6th Cir. 1990), the court cited the *Cannon* passage and observed that:

> [T]he principle enunciated there should be applied in any case where federal court jurisdiction depends on the relationship between a corporate parent and its corporate subsidiary. That principle is: When formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent. So far as we can determine, every court of appeals that has considered the question has reached this conclusion.

Id. at 283.

[173] *Hargrave*, 710 F.2d at 1160.

[174] *Id.* at 1159 (citation omitted).

In reading *Cannon* as both endorsing formalism and approving a necessary exception to such formalism, *Hargrave* adopted an interpretation of Justice Brandeis's decision that had been widely followed by courts in other circuits as well.[175] The most commonly applied exception to respecting the separate incorporation of affiliated entities is when evidence exists that undue control by one of its members has been exerted.[176]

The question of control, however, has been applied inconsistently by the courts. I will take up the important question of control and its relevance to rethinking the use of veil piercing in the jurisdictional test, but for now, it is enough to note that *Hargrave* and its acceptance of the use of veil piercing for jurisdictional purposes remains the law of the circuit.[177]

In apparent contrast to *Hargrave* and other cases that continue to accept *Cannon* as good law, other courts regard *Cannon* as having no applicability in the modern jurisdictional era.[178] Some have concluded, more broadly, that the decision has been entirely and directly overruled by the Court's subsequent decisions.[179] A later case frequently cited by the lower courts as directly overruling *Cannon* is

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[175] *See* BLUMBERG, *supra* note 19, at 58 (observing that "[m]ost of the federal courts considering questions of jurisdiction with respect to parent and subsidiary corporations have continued to apply the *Cannon* doctrine") and authorities cited therein.

[176] *See id.* at 60-62 (discussing how courts have distorted *Cannon* into a test considering participation in day-to-day operations).

[177] *See, e.g.*, Dickson Marine Inc. v. Panalpina, Inc., 179 F.3d 331, 339 (5th Cir. 1999) (applying the *Hargrave* test).

[178] *See* BLUMBERG, *supra* note 19, at 66-73 (discussing those cases rejecting *Cannon*). For instance, in the leading case in the Sixth Circuit, *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964), the Court noted that:

> [T]he ruling of the Cannon case, if not qualified by the subsequent ruling in the International Shoe Company case, has been at least qualified in later cases holding foreign corporations amenable to the personal jurisdiction of local courts because of the local activities of subsidiary corporations upon the theory that the corporate separation is fictitious, or that the parent has held the subsidiary out as its agent, or, more vaguely, that the parent has exercised an undue degree of control over the subsidiary.

Id.

[179] *See, e.g.*, Meredith v. Health Care Prods., Inc., 777 F. Supp. 923, 926 (D. Wyo. 1991) (noting that "[b]ecause the jurisdictional question requires the balancing of many factors, the formal separation of corporate entities does not alone raise a bar to the court exercising jurisdiction"); Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1419 (E.D. Wis. 1983) (stating that "[i]n light of [cases following *Cannon*], reliance on the rule of *Cannon* and on alter ego principles of corporation law to determine a nonresident's 'presence' is no longer relevant to . . . jurisdiction"); Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414, 421 (E.D. Pa. 1979) (remarking that "[t]he substance, not form, of the inter-corporate nexus will be dispositive").

United States v. Scophony Corp.[180] The question in *Scophony* was whether a British corporation was amenable to service of process in a federal district court for antitrust violations under §§ 1 & 2 of the Sherman Antitrust Act[181] and § 12 of the Clayton Act.[182] Under § 12, a corporation could be served with process in any judicial district in which it is an inhabitant or where "it may be found."[183] Additionally, venue was proper in any district where "it may be found or transacts business."[184]

Scophony, the British manufacturer, had organized American Scophony as a wholly owned subsidiary to promote its products in the United States. In holding that the British parent was "found" in the judicial district within the meaning of § 12 and thus amenable to suit in the federal court in which the action was filed, the Court distinguished cases involving "manufacturing and selling companies," citing, inter alia, *Cannon*.[185] Justice John Rutledge wrote for the majority that there was "no such situation as was presented in the manufacturing and selling cases on which appellee lies."[186] He suggested further that the "pulverizing approach" of cases like *Cannon* failed to recognize the actual business "enterprise" in which parent and subsidiary corporations often operate.[187]

> Such a continuing and far-reaching enterprise is not to be governed in this respect by rules evolved with reference to the very different businesses and activities of manufacturing and selling. Nor, what comes to the same thing, is the determination to be made for such an enterprise by atomizing it into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct, by the process sometimes applied in borderline cases involving manufacturing and selling activities.[188]

A number of courts and commentators have regarded *Scophony* as a rejection of Brandeis's "atomizing" decision.[189] It is well worth

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[180] 333 U.S. 795 (1948).

[181] Sherman Act, 15 U.S.C. §§ 1-7 (2000).

[182] Clayton Act, 15 U.S.C. §§ 12 (2000); *see also Scophony*, 333 U.S. at 796.

[183] 333 U.S. at 796 n.1 (citing 15 U.S.C. § 12).

[184] *Id.*

[185] *Id.* at 812-14, 813 n.23.

[186] *Id.* at 816.

[187] *Id.* at 817.

[188] *Id.*

[189] *See, e.g.*, B.J. Semel Assocs. v. United Fireworks Mfg., 355 F.2d 827, 832 n.7 (D.C. Cir. 1965) (criticizing the court's reasoning in Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962), but noting that the opinion suggested that *Cannon* "should be broadly viewed in light of what the Supreme Court had later said in *Scophony* about the liberalized scope of Section 12"); Phone

noting, however, that rejecting *Cannon* means different things to different people. Blumberg treats *Scophony* as affirmation that the courts should not be tied to a "formalist" treatment of jurisdictional inquiries and as disapproving of the "entity" theory of corporate law insofar as it ignores "economic realities."[190]

Some courts have followed Blumberg insofar as they have departed from the traditional understanding of *Cannon* and rejected in toto the use of veil-piercing law as a predicate for an indirect jurisdictional outcome. In *Energy Reserves Group, Inc. v. Superior Oil Co.*,[191] for example, Chief Judge Theis carefully analyzed the plaintiff's veil-piercing argument and, after considering the historical evolution of the Supreme Court's constitutional jurisprudence on the law of personal jurisdiction, concluded that veil-piercing doctrine should play no role under modern jurisdictional doctrine:

> Propriety of piercing the corporate veil rests upon an analysis of corporate law factors. The constitutional propriety of the exercise of jurisdiction rests upon a balancing of the different considerations noted above. The results obviously are not necessarily consistent.
>
> Concededly, a corporation's relationship with an affiliated corporation in the forum is relevant to the due process question in a manner different from that in which it pertains to the corporate law question of alter ego relationships and "veil-piercing."[192]

The court ultimately concluded that even without resort to veil-piercing doctrine, the plaintiff had made a sufficient showing of the defendant's amenability to suit to uphold the exercise of jurisdiction.[193]

Unfortunately, other courts have concluded that *Cannon* was rejected only insofar as it applied a formalistic test to determine when

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Directories Co. v. Contel Corp., 786 F. Supp. 930, 939 (D. Utah 1992) ("In *Scophony*, the Supreme Court expressly declined to apply [*Cannon*] in defining the language of the service of process provision of § 12."); BLUMBERG, *supra* note 19, at 176-78 (discussing courts' increasing rejection of *Cannon* in light of *Scophony* and interpreting *Scophony* as "reject[ing] the fragmentation approach to formalism").

[190] BLUMBERG, *supra* note 19, at 47, 176-78.

[191] 460 F. Supp. 483 (D. Kan. 1978).

[192] *Id.* at 507.

[193] *Id.* at 512-15. The court found that the subsidiary, Superior Overseas, "by itself [fell] within the ambit of subsection (b)(5)" of the Kansas long-arm statute, insofar as "Superior Overseas [had] entered into a contract which [called] for partial performance by both parties in the state" and that the exercise of jurisdiction satisfied "traditional notions of fair play and substantial justice." *Id.* at 512.

the substantive law may be employed for jurisdictional purposes.[194] Those who read *Cannon*'s demise in this fashion continue to regard the premise of vicarious jurisdiction as acceptable. The underlying assumption is that once *Cannon*'s formalism is set aside, the courts may consider the use of substantive law to pierce through the fiction of corporate separateness. Even some courts that purport to follow Chief Judge Theis's careful reasoning in *Energy Reserves* nonetheless continue to measure jurisdiction through consideration of veil-piercing assertions.[195]

In re Telectronics Pacing Systems, Inc.[196] is another case rejecting the precise holding of *Cannon* as no longer good law, yet continuing to measure the constitutional propriety of indirectly exercising jurisdiction by attributing the forum contacts of separately-incorporated subsidiaries to the absent corporate parents. In *In re Telectronics*, Judge S. Arthur Spiegel cited the Sixth Circuit's decision in *Velandra*[197] for the proposition that "formalistic application of the alter ego doctrine under *Cannon* was displaced by *International Shoe*."[198] Thus, the fundamental problem with *Cannon* was that its "presumption of form over substance [was] out-of-step with the modern approach to personal jurisdiction."[199]

Encouragingly, the court seemed to dismiss the plaintiff's attempt to base jurisdiction on the use of alter ego principles.[200] Yet, having

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[194] *See, e.g.*, DeCastro v. Sanifill, Inc., 198 F.3d 282, 283-84 (1st Cir. 1999) ("[T]o establish jurisdiction over the parent, a party must produce 'strong and robust' evidence of control by the parent company over the subsidiary, rendering the latter a 'mere shell.'"); Indian Coffee Corp. v. Procter & Gamble Co., 482 F. Supp. 1098, 1104 (W.D. Pa. 1980) (using *Cannon* as controlling precedent in dismissing claim against the parent company for a subsidiary's alleged antitrust violation), *aff'd*, 752 F.2d 891 (3d Cir. 1985); *In re* Chicken Antitrust Litig., 407 F. Supp. 1285, 1294 (N.D. Ga. 1975) ("Where the subsidiary maintains its separate entity and carries in its activities without having its daily business affairs controlled by the parent . . . the subsidiary will not render the parent corporation transacting business in the district . . . ."); *see also infra* text accompanying notes 195-205 (discussing cases that have rejected *Cannon's* formalism but continue to use the substantive law of veil piercing to measure the constitutional limits of state court power).

[195] *See, e.g.*, Hoffman v. United Telecomms., Inc., 575 F. Supp. 1463, 1470-76 (D. Kan. 1983) (using the parent-subsidiary relationship and the extent of control the parent exercised over the subsidiary as determinative of whether there were minimum contacts with the forum).

[196] 953 F. Supp. 909 (S.D. Ohio 1997), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000).

[197] Velandra v. Regie Nationale des Usines Renault, 336 F.2d 292 (6th Cir. 1964).

[198] 953 F. Supp. at 916 (citing *Velandra*, 336 F.2d at 297).

[199] *Id.* at 918.

[200] *Id.* at 915. The court cited *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978), and noted that "[t]he formalistic approach of the alter ego

noted that the substantive law of alter ego was crafted with different purposes in mind than the assessment of personal jurisdiction, the court proceeded to cite Brilmayer and Paisley's *California Law Review* article[201] as the basis for examining whether there was either a basis for "attributing" the subsidiary's contacts to the parent or for "merging" the parent and subsidiary into a single entity for jurisdictional purposes.[202] Ultimately, Judge Spiegel concluded that there were sufficient facts presented to "create an inference 'that the absent parent and the subsidiary are in fact a single legal entity,' at least for the purposes of exercising jurisdiction."[203] What facts allowed the judge to infer that a merger existed? Essentially, the inference turned on the degree of "day-to-day" control that the absent defendants possessed over subsidiaries with forum connections.[204] Left unexplained, however, was why it was necessary to merge these entities to create an "inference" that they were "a single legal entity" for jurisdictional purposes, rather than merely regarding the same evidence as demonstrating sufficient direct connections between the nonresident defendants and the forum. In this latter regard, *In re Telectronics* again reflects how "control" is used to support attributive jurisdictional theory and not as a measure of a defendant's direct involvement in the forum-related activities leading to the dispute. Even if the court reached the right result, its analytical emphasis on "merger" has lent confusion to the case law in the Sixth Circuit including, rather remarkably, its own later opinion as to the jurisdictional amenability of the same parent companies to be bound to a proposed class settlement.[205]

In sum, even where *Cannon* has been rejected as inapplicable to the constitutional inquiry or otherwise rendered obsolete by more recent decisions, veil piercing is still used to measure the constitutional limits of state court power. Framed in this light, subsequent cases may

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doctrine . . . is irrelevant to the question whether the exercise of jurisdiction over an absent parent corporation would violate the Due Process Clause." *Id.*

[201] Brilmayer & Paisley, *supra* note 31.

[202] *In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. at 918.

[203] *Id.* at 921 (quoting Brilmayer & Paisley, *supra* note 31, at 12).

[204] *Id.* The Court noted, inter alia, that parent company "officials participated in the day-to-day operations of the [subsidiary] Telectronics Companies" and that "[c]ollectively, Defendants often treated these institutions as one entity for internal and external purposes." *Id.*

[205] *See* Beckert v. TPLC Holdings, Inc. (*In re* Telectronics Pacing Sys., Inc.), 221 F.3d 870, 878-80 (6th Cir. 2000) (reversing Judge Spiegel's order approving a settlement that excluded Australian parent companies over which the court "was unlikely to obtain jurisdiction," noting that the decision "appears to contradict the court's finding in its earlier order denying the Australian defendants' motion to dismiss for lack of personal jurisdiction").

have eclipsed *Cannon*'s formalism or the precise doctrinal underpinnings of the case, but the basic assumption that state court power may be measured vicariously through reliance on the substantive law of veil piercing remains largely unchallenged.

D. *Reconsidering the Canon of* Cannon

As we have just seen, according to conventional wisdom the Court's decision in *Cannon* approves the use of veil piercing for jurisdictional purposes. However inviting, this conventional view of the case does not withstand closer scrutiny. Legal historian Edward Purcell has noted that time and distance lead scholars and judges to distort the intended meaning of a case, as the historical context in which the legal issues were argued and the decision was reached is lost.[206] If the historical evidence is gathered and carefully considered, however, the mainstream interpretation of *Cannon* as broad support for the model of vicarious jurisdiction must be questioned.

1. Difficulties with the Conventional View of *Cannon*

The first problem with the conventional view of Brandeis's opinion in *Cannon* is that it cannot be squared with the Justice's ardent opposition to the regime in *Swift v. Tyson*.[207] In drawing a distinction between real and fictitious corporate separations in *Cannon*, Brandeis failed to cite any state law authorities to explain why one corporate group should be treated as being comprised of separate entities while related but separately incorporated entities should be regarded as a single juridical unit. Thus, his conclusion that the corporate separateness of Cudahy and its subsidiary should be respected seems to be based on natural and self-evident principles of justice, a kind of general federal common law still permissible in the years before *Erie Railroad v. Tompkins*.[208] If the standard interpretation of Brandeis's opinion as approving the use of substantive law to reach indirect jurisdictional outcomes is correct, then this raises one of the most intriguing mysteries about the *Cannon* case: Why would Brandeis, of all people, have written an opinion that relies so centrally on general federal common law?

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[206] PURCELL, *supra* note 34, at 4-6.

[207] 41 U.S. 1 (1842) (holding that in diversity cases, federal courts are bound only by state statutes and interpretations of statutes and are otherwise free to develop and apply their own common law rules), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[208] 304 U.S. 64 (1938).

The question is more vexing still if one considers that the *Cannon* case embodied so much of what Brandeis vehemently decried about the diversity jurisdiction of the federal courts and the attendant consequences of the *Swift* rule. Here was a battle between unequal parties—Cudahy was a corporate behemoth that conducted business on both a national and international scale; that was no stranger to litigation in the federal courts and even the Supreme Court; that frequently invoked diversity jurisdiction to seek what it viewed as a safer, usually corporate-friendly forum. Long before *Erie*, Brandeis had expressed disdain for rules which permitted corporate defendants to abuse the judicial process in this manner.[209] Why would Brandeis have gone out of his way, as the conventional view must assume, to justify Cudahy's dismissal by relying on an articulation of general federal common law?

One answer, perhaps, is that Brandeis may have felt that *Cannon* was not the right case for making the argument against the rule in *Swift*. Thirteen years before the decision in *Erie*, the regime in *Swift v. Tyson* was predominant. Indeed, in other decisions before 1938, Brandeis (and Holmes) concurred in the Court's decisions approving federal common law.[210] Even if Brandeis was already opposed to the *Swift* rule in 1925, and we know he was, he nonetheless may not yet have been ready to mount an attack on the established precedent. He may simply have preferred to keep his powder dry to fight another day. Yet, while the *Cannon* case may not have been the occasion for overturning *Swift*, and while Brandeis's failure to cite any state authorities can be recognized as quite unexceptional for the era, it seems doubtful that he would have gone out of his way to write an opinion that depended so centrally on a general federal common law standard of veil piercing for jurisdictional purposes.

There is another explanation for this apparent contradiction between Brandeis's decision in *Cannon* and his opposition to the rule in *Swift*, but it requires that we rethink some basic assumptions about the case. Conventional wisdom accepts the premise that Brandeis approved of the incorporation of general federal common law to support a model of vicarious jurisdiction and then seeks an explanation to square *Cannon* with his disapproval of *Swift*. If, however, we start by reexamining this premise, the apparent contradiction with his

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[209] *See* PURCELL, *supra* note 34, at 143 (describing Brandeis's "[p]rogressive hostility toward large corporations on the grounds that they exploited the availability of diversity jurisdiction").

[210] *Id.* at 117-40.

opposition to the rule in *Swift* is more easily reconciled. A more persuasive explanation for Brandeis's failure to cite state authorities in *Cannon* is that the accepted wisdom about the case is wrong. In upholding the district court's order, Brandeis did not endorse reliance on any substantive common law rule—state or federal—to determine whether attribution of the contacts of one person or entity to another should be permitted absent legislative authorization of veil-piercing law for jurisdictional purposes.

Let us return to the text of the *Cannon* opinion itself and consider it alongside the arguments advanced by the parties in their briefs to the Court. Brandeis followed Cudahy's argument against using substantive law to disregard the corporate form for jurisdictional purposes. He also correspondingly rejected Cannon's central argument that the Court should use corporate disregard doctrine to treat the two corporations as a single entity. *Cannon* cited a number of decisions in support of its view that the corporate separateness of the parent and subsidiary should be ignored for assessing the validity of service of process. In these cases the limited liability protections of the corporate form were disregarded for substantive purposes.[211] By comparison, Cudahy argued in its Supreme Court brief that these authorities were inapposite because they all involved issues of substantive law.[212] The issue, Cudahy observed, was service of process, not substantive liability:

> There have been many cases recently decided by the courts in which in dealing with parties properly brought before their jurisdiction they have treated subsidiary corporations as one with the parent corporation when this action was necessary to do substantial justice. Certain of these cases were cited by plaintiff in its brief filed in the court below, but all are absolutely no authority for the contention that for purposes of acquiring jurisdiction-particularly when it is not necessary to do justice–the courts will disregard the separate entity of either corporation.[213]

It may be recalled that the distinction between use of corporate disregard doctrine for substantive rather than for jurisdictional ends

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[211] *See* Brief of Plaintiff, *supra* note 96, at 43-54 (presenting cases to illustrate that "[e]very time courts come into contact with a corporation which is 'merely an instrumentality or adjunct of another corporation' they disregard it and deal with the real owner").

[212] *See* Brief of Defendant in Error, at 42-47, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author).

[213] *Id.* at 42.

also was endorsed by the district court in its decision quashing service on Cudahy.[214]

In his opinion for the Court, Brandeis followed both the district court and the defendant in rejecting a similar attempt to use substantive legal rules for jurisdictional purposes: "There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant. Hence, cases concerning substantive rights . . . have no application."[215] In other words, the question was service of process, not substantive liability. From this perspective, service on Ross was ineffective in *Cannon* not because the plaintiff made an insufficient showing that the separate corporate identities of Cudahy and its subsidiary should be merged. Service was ineffective because showing merger could never be sufficient to demonstrate jurisdiction where the service of process statute did not expressly authorize using corporate disregard doctrine to justify in-state service on the absent parent.

A second difficulty with the conventional view of *Cannon* is that it conflicts with the evidentiary record of the internal court discussions culled from Brandeis's case files. In 1925, it was a novel notion, to say the least, that federal courts could invoke the substantive doctrine of corporate disregard to support in-state service on an entity affiliated with a defendant not present in the forum. Neither the Supreme Court nor any lower federal or state court had approved such a practice. This is hardly surprising given the primitive state of corporate disregard doctrine. One would expect, then, that if Brandeis had intended to revolutionize the law of jurisdiction by linking the validity of in-state service to an application of the undeveloped substantive law of veil piercing, the effort would have met with considerable discussion and debate among the Justices on the nation's highest court. Quite to the contrary, however, evidence of the internal court discussions of the case reveals remarkable agreement among the members about how the case should be decided. None of the Justices appears to have thought that Brandeis's opinion altered the law of jurisdiction to any significant degree. Although one certainly should be cautious about forming any conclusions based on this information alone, it is consistent with other available evidence and thus is further support for rejecting the conventional interpretation of *Cannon.*

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[214] *Supra* text accompanying notes 142-46.

[215] Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337 (1925) (internal citations omitted).

Chief Justice William Howard Taft assigned the task of drafting the *Cannon* opinion to Brandeis. There is no record or account of the Justices' initial discussion and views of the case, but it appears that there was an early general consensus about how the case should be disposed. It was little more than a month from the time the case was argued on January 28, 1925 that the Court announced its March 2 decision.[216] For any court, that would be a very short turnaround time in which to announce a decision on the merits; indeed, as compared with decisions in other cases during the October 1924 term, *Cannon* was decided (and the opinion completed) very rapidly.[217]

Additionally, apparently none of Brandeis's brethren had any fundamental objections to the draft opinion he circulated.[218] All signed off on the version Brandeis sent to them, indicating their concurrence in notes they returned to him.[219] Several of the Justices offered suggestions for improvements, although these were mostly stylistic in nature; in fact, only the proposed changes from McReynolds can be characterized as substantive. McReynolds's suggestion was to modify a sentence that would turn out to be central to the opinion: Brandeis's statement that "[t]he corporate separation, though perhaps merely formal, was real."[220] McReynolds proposed deleting the qualifying phrase "though perhaps merely formal."[221] The sentence itself had not been included in the original draft Brandeis composed,

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[216] *Cannon*, 267 U.S. at 333.

[217] *Cf., e.g., Ex parte* Grossman, 267 U.S. 87, 87 (1925) (announcing a unanimous decision on the same day as *Cannon*, though oral argument had occurred approximately three months earlier, on December 1, 1924).

[218] Memorandum of Justice Louis Brandeis, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author). This undated draft opinion is contained in the Papers of Louis D. Brandeis, Special Collections of the Harvard Law School Library and is also available through the Indiana University School of Law Library.

[219] Memoranda from Justices William Howard Taft, Pierce Butler, Willis Van Devanter, Edward Sanford, Oliver Wendell Holmes, James McReynolds, and George Sutherland to Justice Louis Brandeis, Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) (No. 255) (on file with author). Holmes wrote that it was "a sound and excellent decision." *Id.* The decision in *Cannon* was 8–0. Justice McKenna had retired from the Court on January 5, 1925, after Taft successfully prevailed upon him to do so and thus did not even participate in oral argument. *See* David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1014-16 (2000) (describing McKenna's forced retirement from Court). Harlan Stone took McKenna's place on the Court in March 1925.

[220] *Cannon*, 267 U.S. at 337.

[221] *See* Memorandum from Justice McReynolds, *supra* note 219, at 3.

although precisely when it was added cannot be ascertained as the drafts in the file are all undated.[222]

In the proceeding draft, the key sentences appear in handwriting in the margin of the paper. They, along with several other changes, were later typeset and the draft was circulated to the other Justices for review and comment. In any event, by the time Brandeis circulated his final draft to the other Justices, the sentence was included. One can only guess what prompted McReynolds's suggested revision. He may very well have believed Brandeis's characterization of the corporate separation between Cudahy and its Alabama subsidiary as both "real" and "merely formal" was an awkward—and perhaps untenable—conception. Whatever the explanation, he apparently overcame any lingering concerns, as neither this suggestion nor any of the more minor revisions proposed by the other justices in their return notes were adopted. The draft Brandeis circulated was adopted unchanged as the final opinion of the Court.

The easy consensus that the Justices reached in *Cannon* cannot be squared with the view that the Court approved an entirely new model of vicarious jurisdiction. To believe that the Court would have adopted a revolutionary jurisdictional framework without any discussion seems highly implausible. Moreover, any suggestion that the case did not break new jurisdictional ground, because the actual holding was to deny jurisdiction, hardly provides much of a responsive explanation. Supporters of vicarious jurisdiction claim that a general rule may be derived from the case—despite its precise holding—approving the use of veil piercing for jurisdictional purposes.[223]

2. Rereading *Cannon*

If the Court in *Cannon* did not sanction using substantive law to determine that the corporate veil of Cudahy's subsidiary should be respected for jurisdictional purposes, then on what basis did the Court conclude that in-state service of process could not compel Cudahy's appearance in the forum? The answer may be found by building on the historical evidence gathered and by rereading the text of the

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[222] Although we cannot fix the precise date that changes were made, it is possible to trace the content of the draft that immediately preceded the version circulated to the other justices. After citing the *Conley*, *Peterson*, and *Peoples Tobacco* cases, the original draft read: "The fact that, in the case at bar, the identity of interest may have been more complete, and the exercise of control over the subsidiary may have been more intimate are, in the absence of an applicable statute, not of legal significance." Memorandum of Justice Brandeis, *supra* note 218, at 2.

[223] *See* BLUMBERG, *supra* note 19, at 74-76.

opinion itself. If the objection to jurisdiction was not constitutional in scope, then it must be that the attempted service was ineffective for some other reason. In *Cannon*, that other reason was a defect in service that arose prior to the constitutional inquiry; namely, that no statutory basis for service on the subsidiary had been demonstrated:

> The claim that jurisdiction exists is not rested upon the provisions of any state statute or upon any local practice dealing with the subject.
>
> . . . Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein.[224]

What about the evidence the plaintiff advanced of the close relationship between parent and subsidiary and the cases it cited whereby the separate corporate identity could be ignored for substantive purposes?[225] Brandeis dismissed this argument with dispatch: "In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited [by the plaintiff], but that fact has, in the absence of an applicable statute, no legal significance."[226] Substantive law was crafted with different ends in mind, Brandeis said explicitly, and cannot readily be borrowed to justify in-state service on an affiliated entity where no enabling legislation authorizes service on this basis.[227]

The key, then, to understanding the decision in *Cannon* is to keep two related points in mind. First, as described above, the decision not to exercise jurisdiction in *Cannon* was made on statutory, not constitutional grounds. Second, by affirming the quashing of service, Brandeis also rejected the effort to base the exercise of jurisdiction on the law of substantive veil piercing. While a number of courts and commentators have concluded correctly that the problem in *Cannon* was statutory, not constitutional,[228] most fail to see the difficulty with

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[224] *Cannon*, 267 U.S. at 336.

[225] *See supra* note 211 and accompanying text (discussing plaintiff's legal arguments).

[226] *Cannon*, 267 U.S. at 336-37.

[227] *Id.*

[228] *See, e.g.*, Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 496 (D. Kan. 1978) (discussing the decreasing role of *Cannon* in a determination of personal jurisdiction since Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) and the prevalence of long-arm statutes); Brilmayer & Paisley, *supra* note 31, at 3 ("[In the *Cannon* opinion,] Brandeis seemed to deny that any constitutional questions were presented and to suggest that the problem was that no state law or congressional act authorized jurisdiction.").

the plaintiff's veil-piercing argument in support of service. If we are clear about both aspects of the problem with service on the parent in *Cannon*, then the Court's purported endorsement of the model of vicarious jurisdiction is readily exposed as inaccurate. Service was ineffective in *Cannon*, not because the plaintiff made an insufficient showing that the separate corporate identities of Cudahy and its subsidiary should be ignored, but because such a showing could never be sufficient to justify the exercise of jurisdiction when neither the state nor federal legislature had attempted to stretch the territorial reach of the court that far. In its regard for the principle of legislative primacy, then, Brandeis's opinion in *Cannon* is entirely consistent with the presumption he endorsed thirteen years later in *Erie*. As Purcell has noted, Brandeis's constitutional theory in *Erie* "was grounded on two related principles":

> The first . . . was that legislative and judicial powers were coextensive. The second . . . was that federal judicial power was also limited to those areas—not involving constitutional rights—where Congress had chosen to act. Absent compelling reason, the federal courts should not make law even in areas within the national legislative power unless and until Congress made the initial decision to assert national authority in that area.[229]

If it is recognized that Brandeis acted with a similar fidelity to the legislative prerogative in mind, then we are again reminded that—contrary to conventional wisdom—the Court in *Cannon* did not approve using a general federal common law of veil piercing for jurisdictional purposes. To believe that it did requires buying into two other assumptions. First, one must accept that, despite his profound opposition to the rule in *Swift*, Brandeis endorsed adoption of an ambiguous federal common law rule in the *Cannon* case that allowed the judiciary to disregard the corporate form for jurisdictional purposes without legislative authorization to do so. The conventional view also requires a second leap of faith: namely, that we accept, with an uncharacteristic level of consensus and without any meaningful discussion or debate among the justices, that the Court adopted a wholly new and expansive view of jurisdiction. Rather than eliding the considerable evidence to the contrary, the more persuasive view is that the conventional wisdom about *Cannon* is wrong.

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[229] PURCELL, *supra* note 34, at 172.

III. BUILDING THE CASE AGAINST VICARIOUS JURISDICTION

I have argued that a careful marshalling of the available historical evidence suggests that the traditional view of *Cannon* is mistaken. The Court did not approve the use of veil piercing in measuring a defendant's amenability to jurisdiction. In this final Part, I put the question of the proper meaning of *Cannon* to one side and focus, instead, on building a case against jurisdictional veil piercing independent of the precedential legitimacy of *Cannon*. Having already dispensed with the notion that the substantive law of veil piercing has any proper role to play in the first two steps of the jurisdictional test—as to notice and statutory amenability to suit—the focus of this final Part concerns the use of veil-piercing doctrine to measure the constitutional limits of judicial jurisdiction.[230] The argument against using the substantive law of veil piercing for jurisdictional purposes proceeds in two parts. I argue, first, that there are real, practical difficulties with relying on the substantive law of veil piercing as a jurisdictional measure; second, I offer a normative claim that questions the legitimacy of invoking veil piercing as a measure of the limits of judicial jurisdiction.

A. *The Pragmatic Case Against Jurisdictional Veil Piercing*

For almost as long as there has been a doctrine, veil piercing has been the subject of searing criticism.[231] It has been derisively called many things: "unprincipled,"[232] "defy[ing] any attempt at rational explanation,"[233] "not entirely comprehensible,"[234] "dysfunctional,"[235] and "freakish[]."[236] Whittled down to their essential core, the critiques of jurists and corporate law scholars may be described as two-fold: veil

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[230] *See* discussion *supra* Part I (describing the three-part process for determining the scope of a court's jurisdiction).

[231] Then a judge on the New York Court of Appeals, Benjamin Cardozo derided the doctrine in 1926—only a little more than a decade after Maurice Wormser's first work on the subject, and, notably, a year after Brandeis's decision in *Cannon*—as "enveloped in the mists of metaphor." Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926).

[232] Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

[233] Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 620 (1975).

[234] BLUMBERG, *supra* note 19, at 8.

[235] Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 506 (2001).

[236] Easterbrook & Fischel, *supra* note 232, at 89.

piercing is *indeterminate* and, worse still, *irrelevant* to the harm caused to the victims the doctrine was ostensibly designed to protect.

1. The Indeterminacy of Corporate Disregard Doctrine

Formulations of the veil-piercing test vary by jurisdiction. Some are based on statute, others on common law; some versions of the test are based on broad standards of equity (e.g., Was the corporation the controlling shareholder's "alter ego"?[237] Did the shareholder exercise "undue domination" and "control" of the corporate form?[238] Was there "unjust enrichment"?[239] Would avoidance of personal liability "sanction a fraud or promote injustice"?[240] and so forth), while others recite a laundry list of factors that, at times, can be quite exhaustive and usually contain all sorts of freewheeling inquiries (e.g., Did the shareholder use the corporation "as a mere shell, instrumentality or conduit"[241] for another business? Was there a "failure to maintain minutes or adequate corporate records"?[242] Was there a "disregard of legal formalities"?[243] Did two related entities use the "same office or business location"?[244] and on and on). What these wildly divergent rules share is a seemingly unavoidable penchant for indeterminacy. As Stephen Bainbridge has observed, veil-piercing cases "are highly fact-specific. Successful veil-piercing claims differ only in degree, but not in kind, from unsuccessful claims."[245] The result of all of this indeterminacy in the standards for piercing, among and within

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[237] *See, e.g.*, Minifie v. Rowley, 202 P. 673, 676 (Cal. 1922) (piercing corporate veil because the corporation was the "alter ego" of its controlling shareholder).

[238] *See, e.g.*, Van Dorn Co. v. Future Chem. Oil Corp., 753 F.2d 565, 569 (7th Cir. 1985) (affirming that the domination by one individual of two corporations and such individual's operation of both corporations "very loosely as suited his convenience" warranted piercing the corporate veil). *See generally* Thompson, *supra* note 20, at 1063 (finding instrumentality—defined as a situation where a corporation is no more than a tool or instrument of its shareholders—and "alter ego" as commonly cited reasons for piercing the corporate veil).

[239] *See, e.g.*, Sea-Land Servs., Inc. v. Pepper Source, 993 F.2d 1309, 1312 (7th Cir. 1993) (citing "unjust enrichment" as one basis for piercing corporate veil).

[240] *Minifie*, 202 P. at 676. ("Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa . . . the facts [must be] such that an adherence to the fiction of the separate existence of the corporation would . . . sanction a fraud or promote injustice.").

[241] Assoc. Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 815 (Cal. Ct. App. 1962).

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] Bainbridge, *supra* note 235, at 506-07.

jurisdictions, is that the precedents applying the doctrine become no precedents at all. Business planners are left unable to give guidance on how a business and its owners may avoid liability. Litigants and courts are forced to struggle on their own with the law's scattershot approach to defining when the corporate shield may be disregarded.

2. The Irrelevance of Veil Piercing

The second, damning critique of veil piercing leveled by jurists and corporate law scholars is that the factors invoked to justify its application are wholly irrelevant to the harm caused to victims. Robert Thompson has shown that, as an empirical matter, veil-piercing doctrine has principally been applied against shareholders in cases involving contract creditors.[246] Yet, as noted by Robert Clark, one of the leading critics of veil piercing, the standards by which agency and instrumentality theories (versions of veil-piercing doctrine in many jurisdictions) are measured "are, upon analysis, singularly lacking in *direct* relevance to the question of the existence, and the amount, of harm caused the outside creditor by the misbehavior of the controlling shareholder."[247] Clark has argued that fraudulent transfer law is better suited for remedying wrongs suffered by contract creditors.[248]

By contrast, the relevance of veil piercing to the rationales behind extending tort liability to involuntary victims of corporate wrongdoing is even more attenuated. As Douglas Michael recently observed:

> [B]y definition, there can be no misrepresentation to, or reliance by, involuntary plaintiffs. Therefore, any discussion of fraud, or even of undercapitalization couched in reliance or expectation terms, does nothing to advance the analysis here. Courts' attempts to deal with this problem by means of the instrumentality or "alter ego" doctrine . . . have been disappointing primarily because the courts look at factors wholly irrelevant to the cause of the plaintiff's injury.[249]

What, for instance, does the fact that a subsidiary corporation failed to maintain minutes or disregarded legal formalities have to

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[246] *See* Thompson, *supra* note 20, at 1058 (recognizing that such findings go against the "conventional wisdom" that tort claimants are more successful at piercing the corporate veil).

[247] Robert C. Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 HARV. L. REV. 505, 553 (1977).

[248] *See id.* at 560-611 ("The law of fraudulent conveyances, together with the law of voidable preferences, implicates a coherent set of conceptually distinct moral principles that should govern the conduct of debtors toward their creditors.").

[249] Douglas C. Michael, *To Know a Veil*, 26 J. CORP. L. 41, 49 (2000) (footnote omitted).

do with the negligence that causes injury to a tort victim? Yet, Thompson's empirical study reveals that when it is found that a defendant has failed to follow legal formalities the courts pierce nearly sixty-seven percent of the time.[250] The one relevant factor commonly appearing on veil-piercing lists is the issue of undercapitalization, or the siphoning off of corporate funds. What any victim (tort and contract creditors alike) really cares about, of course, is not whether the corporation followed corporate formalities or the like, but whether there is money to cover their losses. Failure to adequately capitalize a corporation, therefore, gets much closer to the actual cause of the harm. It is also clear, however, that courts typically do not regard undercapitalization as a dispositive factor in deciding whether to impose personal liability on shareholders.[251]

3. Applying the Critiques of Substantive Veil Piercing to the Jurisdictional Realm

If veil piercing as a matter of substantive law is unpredictable and unprincipled, it is equally so when applied in the jurisdictional context. In measuring the limits of judicial power, the use of veil piercing carries significant practical costs both before and after litigation ensues. Lawyers have difficulty adequately counseling their clients ex ante to avoid individual liability; ex post, litigation becomes costlier and more unwieldy. While it is difficult to quantify how much desirable prelitigation behavior is deterred (and, correspondingly, how much undesirable behavior is made necessary) by maintaining an unprincipled doctrine, it is possible to get some sense of the litigation costs that are sustained. As compared with direct jurisdictional inquiries, indirect jurisdictional examinations tend to be both more complicated and less determinate. *Dunn v. A/S Em. Z. Svitzer*[252] is a good example of these difficulties. It also shows how even the most careful jurists can be led astray by vicarious jurisdiction assertions.

At first blush, *Dunn* presents itself as a rather complex case. Fourteen separately named defendants, five different sets of legal counsel, and an injury-inducing accident that occurred overseas.[253] Of the fourteen named defendants, only two had *any* contacts with Texas, and none of these contacts were related to the claims being asserted

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[250] Thompson, *supra* note 20, at 1063 tbl.11.

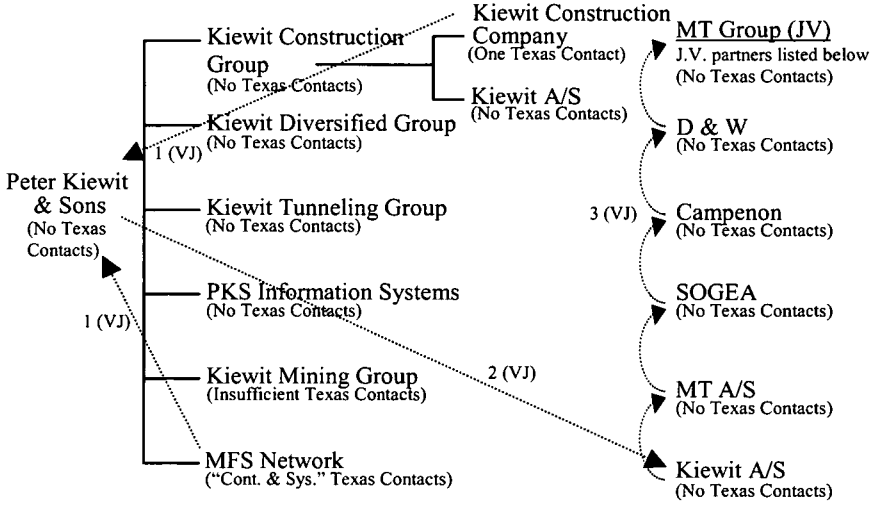
[251] Bainbridge, *supra* note 235, at 520-21.

[252] 885 F. Supp. 980 (S.D. Tex. 1995). *Dunn* involves workers injured while working abroad who brought civil actions against several foreign companies. *Id.* at 980.

[253] *Id.* at 982-83.

in the case.[254] The plaintiffs premised the exercise of the federal court's general jurisdiction over the remaining twelve defendants on a vicarious jurisdiction argument or, more precisely, on several vicarious jurisdiction arguments. To demonstrate the court's power over some of the defendants, the plaintiffs layered two vicarious jurisdiction claims on top of one another; for others, amenability depended on the layering of three vicarious jurisdiction claims.[255] The chart below gives some sense of the jurisdictional complexity that the court was forced to confront.

Kiewit Corporate Structure



The 1(VJ) line reflects the first vicarious jurisdiction argument the plaintiffs advanced. According to this argument, the court should invoke veil-piercing law to disregard the separate entity status of the two subsidiaries with Texas contacts and attribute their forum nexus to the parent company. Assuming the Texas contacts of two of its subsidiaries could be attributed up to the parent, the plaintiffs next argued in 2(VJ) that the corporate veil between Kiewit A/S and the parent should be pierced. This would then allow the court to attribute down to this separate subsidiary—who otherwise had no connection to the state—Texas contacts that had been vicariously ascribed to the parent. Finally, assuming these two piercing claims were permitted, the plaintiffs argued in 3(VJ) that it was appropriate to attribute the

[254] *Id.* at 989-90.
[255] *Id.* at 983-90.

twice-removed vicarious Texas contacts ascribed to Kiewit A/S to the joint venture and its other four members.[256]

That Judge Lee Rosenthal chose to analyze these arguments rigorously, consistent with the prevailing law of the Circuit, is testimony to the dedication of one thoughtful jurist. It is also, however, reflective of the distorting excesses to which the prevailing model of vicarious jurisdiction may be taken. If the vicarious jurisdiction arguments presented in *Dunn* had been rejected out of hand, the jurisdictional question would have been more readily resolved. Indeed, one may surmise that no lawsuit would have been filed in Texas in the first place because there was no evidence of any direct involvement in the forum by twelve of the fourteen defendants. The problem that *Dunn* typifies has little to do with the court's conclusion: At the end of the day, all defendants were dismissed, save for the one joint venture member with sufficient contacts in Texas of its own to satisfy the general jurisdiction threshold.[257] Rather, the problem is that the court felt obliged to examine all of the business relationships between the defendants, in light of the governing controlling authorities in the circuit, that approve consideration of vicarious jurisdictional inquiries.

If *Dunn* is an illustration of the excesses to which vicarious jurisdictional theory may lead, it is not an outlier. Indirect jurisdiction cases routinely require heavier labor in gathering, examining, and analyzing facts because of the ambiguous nature of the veil-piercing law on which the jurisdictional argument is predicated. As applied in the jurisdictional context, veil piercing has the practical effect of raising the litigation costs for all parties through the burdens of added discovery and other pretrial matters.[258]

It may be suggested, however, that veil piercing does not necessarily produce wrong results in practice. Although the prevailing wisdom

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[256] Because the chart amply illustrates the complexity of the jurisdictional assertions advanced, I have intentionally left off additional vicarious jurisdiction arguments made by the plaintiffs to justify exercising jurisdiction over the remaining Kiewit subsidiaries. It may be noted, however, that they followed a similar pattern to the layering argument described above, except that the 3(VJ) argument was not needed as to these remaining defendants. *See id.* at 987-90.

[257] *Id.* at 992.

[258] *See, e.g.*, First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 177 (2d Cir. 1998) (finding that the district court abused its discretion in refusing to allow plaintiff additional discovery before granting defendant's motion to dismiss for lack of subject matter jurisdiction, where such discovery was relevant to the question of the degree of control maintained by the central banking authority in Iraq over an affiliated bank for purposes of assessing the applicability of the Foreign Sovereign Immunities Act).

in corporate law circles is that veil piercing is wrongheaded, some scholars have argued that judges manage nonetheless to reach the right results.[259] If the judicial hunch[260] can overcome the doctrinal limitations of veil piercing, then whether or not use of the veil-piercing doctrine actually violates the liability predicate principle of jurisdiction on a theoretical level, there may be little practical consequence in maintaining the prevailing model of vicarious jurisdiction.

Incorporating veil piercing into jurisdiction is problematic, but it does not necessarily produce wrong outcomes, at least in most specific jurisdiction cases.[261] Furthermore, it is a hollow suggestion that it is even possible to distinguish "right" jurisdictional outcomes from "wrong" ones. Surely, what is right to the victor will look decidedly less right to the vanquished. The pragmatic argument against veil piercing does not depend, however, on the premise that courts will always (or even frequently) reach the wrong jurisdictional result. The assertion that the doctrine should be maintained because judges can and do overcome the difficulties of veil-piercing law ignores the pernicious social and economic consequences that are borne by litigants and nonlitigants alike from the mere continued existence and potential application of an ambiguous and unprincipled doctrine. Cass Sunstein notes that ambiguous rules—especially those that rely on imprecise, multilayered factors, such as veil piercing—make reliance upon those rules difficult; as a result, ambiguous rules produce substantial social costs.[262] Otherwise desirable behavior is deterred, while

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[259] *See* Thompson, *supra* note 20, at 1037 (observing that despite repeated criticisms of veil-piercing doctrine, "many believe that beneath this layer of unhelpful language courts are getting it right" (citing Adolf A. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 345 (1947); Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 630 (1936)).

[260] See Latty, *supra* note 259, at 634-35 for the posit that, although it is not:

> impossible for a court to reach a correct decision, state the result in orthodox entity language and yet reveal the real reasons for [a] holding . . . with so convenient a verbal formula as the separate-and-distinct-entity concept and its antidote, entity-disregard, judicial opinions are not likely to reveal the real reasons for the decision.

Id.

[261] *See infra* text accompanying notes 268-306 (critiquing jurisdictional veil piercing, but distinguishing specific from general jurisdiction cases).

[262] As Cass Sunstein has observed:

> In modern regulation, a pervasive problem is that members of regulated classes face ambiguous and conflicting guidelines, so that they do not know how to plan. For people who are subject to public force, it becomes especially important to know what the law is before the actual case arises. Indeed, it may be more important to know what the law is than to have a law of any particular kind. Consider, for instance, the *Miranda* rules. A special virtue of those rules

wasteful or unwanted behavior is fostered. Moreover, reported decisions are but a small percentage of the total number of lawsuits filed, and the total number of lawsuits filed is, in turn, only a small percentage of the total quantum of behavior affected by prevailing legal norms. Accordingly, veil piercing factored into a jurisdictional analysis would have the negative potential to at best confuse and, at worst, misguide businesses and litigants.

Taken together, all of the added complexity and reduced certainty attendant to the invocation of veil piecing for jurisdictional purposes produces significant costs. Those operating at the ground level—business planners, litigants, and trial courts—most heavily bear these costs because they must operate within a complex and indeterminate body of law. The complexity and indeterminacy of vicarious jurisdiction precedents may distort the litigation matrix. Such precedent makes the pretrial processes of discovery and of motion practice overly burdensome, which is likely to increase the in terrorem value of suits asserting such jurisdictional theories.

In sum, as compared with direct jurisdictional analysis, the current model warrants reconsideration. The model's distorting consequences, which flow from allowing vicarious jurisdictional assertions to be made, are measured by increased uncertainty before litigation and by reduced predictability and added expenses after filing. Thus, even if judges in reported cases overcome the limitations of the formal doctrine, the costs are substantial in maintaining a doctrine as incoherent and unpredictable as veil-piercing law.

B. The Normative Case Against Jurisdictional Veil Piercing

1. The Case *for* Veil Piercing

To develop the normative case against the use of veil piercing in measuring the constitutional limits of judicial jurisdiction, it is instructive to first consider the case in support of applying veil piercing in jurisdictional analysis. By identifying the justifications that underlie reliance on the use of veil piercing, it is possible to construct a

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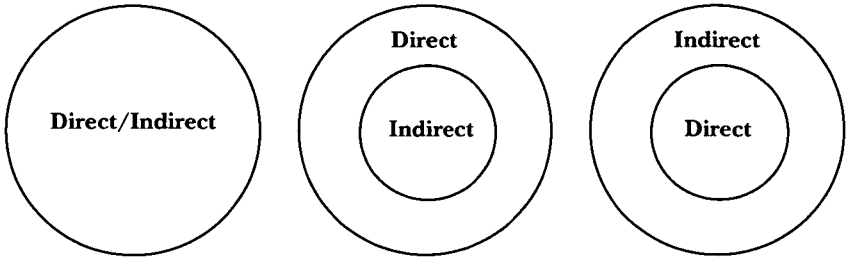
is that they tell the police specifically what must be done, eliminating the guessing games that can be so destructive to *ex ante* planning. So, too, in the environmental area, where prospectively clear rules, even if strict, are often far better than the "reasonableness" inquiry characteristic of the common law. Under a multifactor test, by contrast, neither government officials nor affected citizens may reliably know their obligations in advance.

Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 955, 976 (1995).

normative argument against incorporation of the substantive law doctrine into the jurisdictional test.

Ultimately, jurisdictional veil-piercing arguments necessarily assume that the reach of judicial power can extend beyond the normal limits absent reliance on a veil-piercing theory. Similarly, substantive veil-piercing law, by its very terms, allows parties to recover against a defendant as an equitable alternative to proving personal liability. There are only three possible applications of veil piercing in the jurisdictional context, as the following graphs depict.



Graph 1 **Graph 2** **Graph 3**

Graph 1 illustrates that the reach of state court power may be coterminous under either a direct or vicarious doctrinal model. So long as direct and vicarious jurisdictional outcomes are coterminous there is no need, at least theoretically, to rely on veil piercing to establish jurisdiction.[263]

A vicarious jurisdictional theory also could be applied less broadly than all available direct theories of jurisdiction, as Graph 2 reflects. One might ask why a plaintiff, under these circumstances, would rely on a vicarious assertion of jurisdiction. The answer is that we would usually expect her not to, although one can imagine that, even where vicarious jurisdiction extends less far than does direct jurisdiction, there may be reasons that could explain reliance on vicarious theory.[264] Whatever the reasons why a plaintiff might choose to rely on a vicarious theory when an available direct exercise of jurisdiction

[263] Of course, there may be practical problems. Ambiguities or limitations in the two tests may provide incentives to choose one jurisdictional basis over another.

[264] For instance, the responsible party subject to jurisdiction under a straightforward application of direct jurisdictional analysis may be judgment proof. Seeking a deeper pocket, the plaintiff may assert a claim against a less responsible, or perhaps nonresponsible, party who might be within the court's reach through application of some vicarious jurisdictional argument. This has surely been the principal motivation for invoking veil piercing as a substantive remedy.

would reach farther, it is the plaintiff's choice to do so. No advocate for retaining vicarious jurisdiction would argue that such theories should replace direct assertions of jurisdiction, only that they should be available as a supplement to existing doctrine. There may be sharp disagreements in any particular case—or even across the entire field—as to whether the Court has extended the boundaries of state court power too far; but a litigant's choice to rely on a theory that would draw a more restricted jurisdictional line than necessary does not bear on the question of whether vicarious or direct jurisdictional assertions are more likely to reach fair results in individual cases. By comparison, legislative bodies are free to truncate judicial jurisdiction through statutes that limit the exercise of jurisdiction to less than the constitutional maximum. Of course, one may be rightly critical of a decision that misapplies a vicarious jurisdiction analysis to cut short an otherwise valid exercise of direct jurisdiction under the constitutional limits the Court has set. The First Circuit's decision in *United Electrical, Radio & Machine Workers v. 163 Pleasant Street Corp.*[265] almost certainly warrants such a critique.

Thus, we are left with Graph 3—where the use of veil-piercing law would expand state judicial jurisdiction—as the only occasion in which vicarious jurisdictional analysis makes a persuasive claim for its incorporation into the jurisdictional inquiry. Douglas Michael has observed that substantive doctrines of corporate veil piercing have long endured despite their incoherence because they are routinely regarded as a necessary, if imperfect, catch-all mechanism for ensuring that no wrongdoers go unpunished.[266] Like the substantive law of veil piercing on which it is predicated, use of veil piercing for jurisdictional purposes may be understood, then, as predicated on a belief that in its absence the scope of judicial power would be greatly circumscribed. The image is clear to the prevailing model's supporters: reject the use of jurisdictional veil piercing—long an accepted weapon in the procedural arsenal—and miscreant tortfeasors, willful contract breakers, and other bad actors will escape responsibility for their actions. In short, retaining veil piercing in jurisdictional analysis is like keeping an ace in the hole.

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[265] 960 F.2d 1080, 1091-97 (1st Cir. 1992), *vacated on other grounds*, 987 F.2d 39 (1st Cir. 1993) (finding that the court lacked personal jurisdiction over a Scottish parent corporation when the plaintiff failed to show that the corporation's veil should be pierced).

[266] *See* Michael, *supra*, note 249, at 55 ("Veil-piercing is used, so we are often told, to reach the right result, or to prevent clever parties (and their lawyers) from subverting the unstated but true purpose of incorporation.").

2. The Imperfect Fit Between Veil Piercing and Jurisdictional Theory

Recognizing that the case for jurisdictional veil piercing depends on its promise that jurisdiction may be made more expansive than it is under direct jurisdictional theory, we may begin to build the case against it. The fundamental fallacy inherent in the argument for veil piercing is that it assumes—without offering a normative justification for doing so—that the reach of judicial power should be expandable beyond the limits to which it would otherwise reach absent reliance on veil-piercing law. While it may be comforting, on one level, to know that vicarious exercises of jurisdiction are available to fill gaps in jurisdictional doctrine, it is the legislature's prerogative to limit judicial power. Where a legislative body has done so without reference to veil-piercing standards, incorporation of the doctrine amounts to an end run around existing statutory limits of judicial jurisdiction. Likewise, reliance on jurisdictional veil piercing is constitutionally infirm to the extent that it validates an otherwise excessive exercise of state power under existing due process limits. Proponents of vicarious jurisdiction may regard veil piercing as a necessary backstop, an equitable remedy at the ready. They fail to explain, however, why a court may exercise jurisdiction under a veil-piercing theory when it would otherwise lack statutory or constitutional authority to do so.

Proponents fail to offer a cogent and convincing explanation precisely because none exists. Just as the substantive doctrine is irrelevant to the reasons tort or contract law would provide a remedy to victims of a corporation's wrongdoing, so too is veil piercing equally irrelevant when it is imported into the jurisdictional equation. The standards by which we measure whether to pierce the corporate veil tell us nothing about the various interests that must be balanced in the constitutional evaluation of judicial jurisdiction.[267] What does a failure to follow corporate formalities, for instance, tell us about the regulatory interests a state may have in allowing suit to be maintained

[267] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that for in personam jurisdiction, a defendant must "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (quotations omitted)); Burbank, *supra* note 61, at 118 (discussing the "headquarters basis" of jurisdiction over a corporation as a balance between and defendant corporation's expectations and the states' interests in having "a least one place where a person or corporation can be sued"); Robert Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens*, 7 TULANE J. INT'L & COMP. L. 91, 109 (arguing for a minimum contacts standard that begins with a finding of some contact with the forum state, then requires purposeful availment giving rise to the cause of action, and finally balances fairness interests between those of the forum state and those of the defendant).

against a nonresident defendant? What possible significance can there be in a finding that regular shareholder meetings were not conducted to the jurisdictional assessment of the defendant's relationship to, and interest in, avoiding suit in the forum or of the plaintiff's interest in maintaining suit there? In short, because the facts relevant to disregarding the corporate form are almost always unconnected with the harm sustained by the victim or the defendant's relationship with the forum, analytic treatment of a veil-piercing argument offers us precious little on which to base a reasoned evaluation of the jurisdictional question.

To be sure, jurisdictional veil piercing is similar to modern jurisdictional decisions in their inability to cogently articulate the rationales underlying jurisdictional determinations. Yet, the use of veil piercing in the jurisdictional formula, unlike in jurisdictional cases generally, takes us farther from any meaningful connection between the application of substantive law and the sound rationales for exercising jurisdiction. To help see how far courts have gone in the wrong direction, it is helpful to consider several examples of jurisdictional veil-piercing cases, which are divided into two categories: specific and general jurisdiction. As we will see, the disconnect between jurisdictional veil piercing and any sound articulation of jurisdictional theory is especially pronounced in general jurisdiction cases, but problems may be seen in the specific jurisdiction cases as well.

A. *Veil Piercing in Specific Jurisdiction Cases*

Specific jurisdiction veil-piercing cases seem to fall into one of two categories. Many of the specific jurisdiction veil-piercing cases discuss veil piercing, but are really more narrowly focused on identifying the conduct of the out-of-state defendant that would demonstrate its control over the in-state wrongful conduct. On these occasions, when veil-piercing is really being used in the jurisdictional analysis in a *meaningful* way—that is, as a test that considers "control" as a surrogate for proof of a defendant's direct involvement in the litigation-triggering events[268]—then the analysis will be necessarily limited to the specific jurisdiction context. If evidence of "control" over the events giving rise to the claim exists, then a sufficient predicate for

[268] *See supra* text accompanying notes 196-205 (discussing cases that use the concept of "control" to support an analysis of jurisdiction).

demonstrating a prima facie case for jurisdiction will have been made; if not, the exercise of jurisdiction should be declined.[269]

Courts should avoid the confusing rhetoric of veil piercing, but in these circumstances, the doctrine is less likely to produce undesirable results, at least in particular cases. While the veil-piercing analysis of many courts turns on the question of control and is properly limited to a search for proof of a defendant's active involvement in the litigation-triggering event, on other occasions the use of veil piercing is much more problematic and lends considerable confusion to the area. Some specific jurisdiction cases avoid placing any particular importance on the question of control and look, instead, to a wide and far ranging set of veil-piercing factors in deciding whether to disregard the corporate form. Others, perhaps more perniciously, purport to focus on control, but, in fact, depart dramatically from cases in the first category that look at control for more sensible purposes. In cases in this latter category, the question of control is often applied for a far less helpful reason: namely, it is used as part of an imprecise doctrinal litmus test for deciding whether to lift the corporate veil.

In the Fifth Circuit's decision in *Hargrave,* for instance, the court recognized that undue control could serve as an exception to *Cannon*'s otherwise rigid formalism, but its focus on control morphed from a valid consideration of control as evidence of the absent corporation's direct involvement in the litigation-triggering events to the question of whether to pierce the corporate veil.[270] "Problems arise," as the *Hargrave* court put it, "in articulating the type and degree of control necessary to ascribe to a parent the activities of its subsidiary."[271]

If, on the one hand, attribution may not occur "so long as a parent and subsidiary maintain separate and distinct corporate entities," attribution is appropriate when the "degree of control exercised by the parent [is] greater than that normally associated with common ownership and directorship."[272] According to *Hargrave,* whether the degree of control is excessive is determined by examining "[a]ll of the relevant facts and circumstances surrounding the operations of the parent and subsidiary . . . to determine whether two separate and

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[269] *See, e.g.*, De Castro v. Sanifill, Inc., 198 F.3d 282, 283 (1st Cir. 1999) (denying jurisdiction over parent where insufficient evidence of control existed to pierce the corporate veil); *see also supra* text accompanying notes 257-61 (arguing that inquiry into veil-piercing factors can raise litigation costs).

[270] Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1159-61 (5th Cir. 1983).

[271] *Id.* at 1159.

[272] *Id.* at 1160.

distinct corporate entities exist."[273] In *Hargrave*, the companies shared no common officers, never had more than one common director, kept separate financial records, filed separate tax returns, and commingled no assets.[274] Following its formulation of the *Cannon* test, the court's ultimate conclusion was that T & N and Keasbey & Mattison "maintained a degree of corporate separation that was more than superficial"[275]—thus, attribution of the latter's forum contacts was unwarranted to support the exercise of jurisdiction over T & N. The Fifth Circuit's approach in *Hargrave* remains the law of the Circuit.[276]

The First Circuit's decision in *De Castro v. Sanifill, Inc.*[277] is another illustration of how control is often evaluated not for the purpose of measuring a defendant's direct forum nexus, but as merely one step in the decision whether to veil pierce as part of the due process inquiry. Injured in Puerto Rico by a sanitation truck, the plaintiff brought suit in district court in Puerto Rico against Sanifill, Inc., a Delaware corporation with its principal place of business in Houston, Texas. Sanifill argued that its two wholly owned subsidiaries and the joint venture into which the two subsidiary companies entered to dispose of municipal waste in San Juan, were the only parties involved in the conduct giving rise to the plaintiff's injuries. Thus Sanifill sought dismissal on jurisdictional grounds.[278] The central question the court considered was whether to attribute the forum contacts of the subsidiaries to their parent, Sanifill, presumably for constitutional purposes though this was not made clear from the court's analysis.[279] Although the court ultimately refused on the factual record of the case to extend jurisdiction vicariously, it accepted the possibility that veil piercing could be used on other facts to support the exercise of jurisdiction over an absent defendant.[280]

To attribute the contacts of the Puerto Rican subsidiaries to the parent, the court observed that it would be necessary for the plaintiff to produce "'strong and robust' evidence of control by the parent

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[273] *Id.*

[274] *Id.*

[275] *Id.* at 1161.

[276] *See, e.g.*, Dickson Marine Inc. v. Panalpina, Inc., 179 F.3d 331, 338-39 (5th Cir. 1999) (applying the *Hargrave* test).

[277] 198 F.3d 282 (1st Cir. 1999).

[278] *Id.* at 283.

[279] *See infra* text accompanying notes 284-86 (discussing how the court looked to control not to determine if jurisdiction was appropriate but rather as a factor to consider in deciding whether to pierce the corporate veil).

[280] *See Sanifill*, 198 F.3d at 285 ("[I]nferring . . . control from the inactivity of the subsidiaries might be appropriate under some circumstances . . . .").

company over the subsidiary rendering the latter a 'mere shell.'"[281] If by "'strong and robust' evidence of control by the parent" the court meant evidence that the injury-producing conduct was the result of actions taken by Sanifill or at its direction, its analysis would have been relevant and instructive. Yet, even before reaching the question of control, the court had already dismissed the possibility that Sanifill had any direct involvement in the claim.[282] By control, the court had something else in mind:

> In the present case, while there was no direct evidence of parental involvement, as such, in the day-to-day activities of the two subsidiaries or in their joint venture, the plaintiffs point to convincing evidence that the subsidiaries lacked assets and were not themselves active following execution of the waste haulage agreement [with the city] on behalf of the joint venture.[283]

Lacking any direct nexus between Sanifill and the forum, the court had to turn to the vicarious jurisdiction assertion also advanced in the case. The plaintiff had argued that "the two subsidiaries in question were so shell-like by virtue of their inactivity as to forfeit recognition as corporations separate from their parent, whose interests they serve."[284] It was only in connection with its attempt to determine whether to disregard the separate entity status of the two subsidiaries for jurisdictional purposes that the court's true reason for looking at control became apparent. The court sought not to demonstrate Sanifill's direct involvement in the waste management operations that gave rise to the suit, but to decide, more abstractly, whether to pierce the corporate veil between it and its subsidiaries:

> In determining whether to disregard the corporate form, courts normally conduct a highly fact-specific inquiry, including, inter alia, consideration of the extent to which a subsidiary may have disregarded corporate formalities; the degree of control exercised by the parent over the day-to-day operations of the subsidiary; overlap in ownership, officers, directors, and personnel; and whether the subsidiary was adequately capitalized.[285]

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[281] *Id.* at 283-84 (quoting Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 905 (1st Cir. 1980)).

[282] *See id.* at 283 (observing that "[t]here is no evidence directly establishing that Sanifill, the parent corporation, owned or operated the truck or controlled the day-to-day activities of its subsidiaries or of the joint venture").

[283] *Id.* at 284.

[284] *Id.*

[285] *Id.*

Evidence of control over the day-to-day operations of the subsidiary should rightly be considered a jurisdictionally relevant fact, but in *Sanifill* the court used it as only one factor in the familiar laundry list of reasons to decide whether to pierce the corporate veil for jurisdictional purposes.[286] Yet, having already determined that the parent was not in control of any of the conduct and activities that allegedly caused the plaintiff's injuries, the court's assessment of "control" for veil-piercing purposes is difficult to comprehend.

As cases like *Hargrave* and *Sanifill* suggest, the question of control will often be considered as one of many veil-piercing factors, rather than as a legitimate indicator of a corporate actor's direct involvement in the litigation-provoking conduct. Yet, when the question is whether the exercise of jurisdiction is constitutionally proper, focus on a laundry list of veil-piercing factors simply misses the mark. When veil piercing is not an inquiry into a defendant's direct involvement in the underlying dispute, but of a looser, less precise variety from the laundry list of commonly invoked veil-piercing factors, there is no meaningful connection between the application of substantive law and the sound rationales for exercising jurisdiction.

B. *The Use of Veil Piercing in General Jurisdiction Cases*

While we have seen that veil piercing can produce problems in specific jurisdiction cases, veil piercing is more problematic when it is invoked for general jurisdiction purposes. The general jurisdiction veil-piercing cases reflect the worst abuses of modern jurisdictional doctrine.

Frummer v. Hilton Hotels International, Inc.[287] illustrates the problem of veil piercing in the general jurisdiction context. While on vacation in England, a New York tourist alleged that he fell in a bathtub in the London Hilton Hotel, owned by Hilton Hotels (U.K.) Ltd., a British corporation.[288] Plaintiff sued Hilton (U.K.), its immediate corporate parent (Hilton Hotels International), and the American parent of the entire Hilton enterprise (Hilton Hotels Corporation).[289] The latter two defendants were unquestionably subject to suit in the state forum; only Hilton (U.K.) objected to suit therein.[290] It was also undisputed

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[286] *Id.* at 284-85.

[287] 227 N.E.2d 851, 852 (N.Y. 1967).

[288] *Id.*

[289] *Id.*

[290] *See id.* (stating that only the U.K. corporation moved to dismiss for lack of personal jurisdiction).

that the New York long-arm statute was inapplicable since the plaintiff's cause of action did not arise from any business the defendants transacted in New York.[291] Therefore, a New York court could only exert jurisdiction over Hilton (U.K.) if the English company was "doing business" in the state.[292]

In a 4–3 opinion, Chief Judge Stanley Fuld upheld the exercise of jurisdiction over Hilton (U.K.),[293] though the rationale supporting the court's conclusion was less than well defined. The "pivotal" basis for the decision, according to Fuld, was that a New York affiliate, the Hilton Reservation Service, handled reservations on behalf of Hilton (U.K.): "[T]he Service does all the business which Hilton (U.K.) could do were it here by its own officials."[294] Yet, standing alone, this relationship with the reservation service provides an incomplete explanation for the court's decision. As Judge Fuld acknowledged, citing *Miller v. Surf Properties, Inc.*,[295] an out-of-state corporation is not "doing business" in the state if an independent contractor in the forum merely solicits business on its behalf.[296] *Miller* disallowed the exercise of jurisdiction of a New York court over a Florida hotel that used a New York reservation service to book reservations.[297] Understanding how the majority distinguished cases like *Miller* helps to elucidate more fully the rationale on which jurisdiction was upheld over Hilton (U.K.) in *Frummer*.

After identifying the role played by the Hilton Reservation Service in booking reservations on behalf of Hilton (U.K.), Judge Fuld proceeded to assert that, unlike the circumstances of *Miller* where the New York travel agency was an independent contractor, the Service and Hilton (U.K.) "are owned in common by the other defendants [Hilton Hotels Corp. and Hilton International] and the Service is concededly run on a 'non-profit' basis for the benefit of the London Hilton and other Hilton hotels."[298] This fact of common ownership

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[291] *Id.* at 852-53.

[292] *Id.* at 853.

[293] *Id.* at 854.

[294] *Id.*

[295] 151 N.E.2d 874 (N.Y. 1958).

[296] *Frummer*, 227 N.E.2d at 854 (citing *Miller*, 151 N.E.2d at 877).

[297] *Miller*, 151 N.E.2d at 877. In *Frummer*, Judge Fuld observed that in *Miller*, "we held that the activities of a 'travel agency' were not sufficient to give our courts in personam jurisdiction over a Florida hotel when the agency's services 'amounted to little more than rendering telephone service and mailing brochures' for the hotel and 30 other independent and unassociated Florida establishments." *Frummer*, 227 N.E.2d at 854 (citing *Miller*, 151 N.E.2d at 877).

[298] *Id.*

was "significant," the majority further intoned, "because it gives rise to a valid inference as to the broad scope of the agency [between the Service and Hilton (U.K.)] in the absence of an express agency agreement."[299]

Understood in these terms, Judge Fuld's opinion is patently misleading. While Frummer appears to authorize the exercise of "doing business" general jurisdiction over one who acts through an agent when the agent does the business that the foreign defendant would otherwise perform, in reality the decision authorizes the exercise of jurisdiction on a different and much broader basis. Without expressly invoking veil-piercing doctrine, Judge Fuld approves the exercise of jurisdiction over Hilton (U.K.) merely because it has an ownership relationship with a forum affiliate, a point not lost on the dissenters.[300] Indeed, it could hardly be otherwise, since the proffered distinction between the reservation service arrangement in *Miller* and the facts in *Frummer* was rather thin. To find that Hilton (U.K.) was doing a sufficient quantum of business in the state to trigger the exercise of general jurisdiction, the attribution of its forum-based affiliate's activities to it became essential. At no point, though, did the court try to connect the rationales for allowing jurisdiction on a "doing business" basis to the particular exercise of "doing business" jurisdiction over Hilton (U.K.).

It might be said that the theory of general jurisdiction is inherently problematic.[301] Certainly many efforts have been made, though with a notable lack of success in finding common ground, to identify rationales for this form of judicial jurisdiction that most of the world finds excessive. Still, the exercise of general jurisdiction in veil-piercing cases is uniquely problematic insofar as there will never be a regulatory interest to justify the exercise of jurisdiction when its sole basis is a reliance on veil piercing or some other artifice to merge otherwise separate entities. As *Frummer* illustrates, exercising jurisdiction merely because a foreign corporate defendant has an ownership relationship with a forum affiliate—even where the cause of action does not arise from any actions taken by the defendant or its affiliate in the forum—stretches the boundaries of jurisdictional theory beyond any

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[299] *Id.*

[300] *See id.* at 855 (Breitel, J., dissenting) ("The occasion for disagreement in this case is the extension of personal jurisdiction over a foreign corporation simply because of its relationship with subsidiary or affiliated corporations of a parent corporation.").

[301] Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172 (2001) (observing that "[b]oth the theory and practice of doing-business jurisdiction are problematic").

discernable limit. All that stands between *Frummer* and jurisdictional infinity is the reasonableness prong of the due process test and, perhaps, forum non conveniens. Yet, for those who regard segregation of fairness from the first part of the *International Shoe* test as doctrinally bankrupt[302] and the forum non conveniens doctrine as impenetrably vague,[303] the exercise of general jurisdiction on a veil-piercing basis hardly appears conditional or self-limiting.

General jurisdiction cases like *Frummer* and specific jurisdiction cases like *Sanifill* illustrate different aspects of the normative problem with jurisdictional veil piercing. In *Sanifill*, we may recognize that the court was careful in its treatment of the jurisdictional inquiry, not letting itself get distracted by a litany of irrelevant veil-piercing factors. We also may recognize that the court ultimately reached the right result, rejecting the exercise of jurisdiction where the facts indicated no conduct by the parent company sufficient to demonstrate its control over its forum-based subsidiaries in the injury-producing conduct.[304] Nonetheless, by its treatment of the question, the court also signaled its approval of the use of veil-piercing principles on other facts.[305] Judge Rosenthal's decision in *Dunn* is another example of a case where a careful jurist ultimately reached the right result but found herself forced to examine all of the business relationships between the

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[302] *See* Casad, *supra* note 267, at 107 (noting that "through the years since the *International Shoe* decision, many lawyers, judges and law professors got lax in their discussions of the 'minimum contact-fundamental fairness' theory" and that "[i]n Justice Stone's opinion in *International Shoe*, 'minimum' was not a term that had an independent meaning, nor was it a qualification of the requirement of contact. . . . One could not tell whether the defendant had such contacts as would satisfy the constitutional minimum until after weighing the competing interests."); *see also* Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 576-83 (1991) (observing, inter alia, that "most recent decisions of the Court . . . have added a most confusing note . . . indicat[ing] that a 'reasonableness' standard is somehow separate from that of minimum contacts and must be met independently" and that "[t]his bifurcated analysis is certain to cause mischief").

[303] *See, e.g.*, Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J., 1137, 1142 (2000) (critiquing forum non conveniens doctrine as overemphasizing private and public convenience factors and underemphasizing choice of law and sovereign interest analysis); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 841 (1985) (arguing that the increasing reliance on the doctrine of forum non conveniens "represents a disintegration of the rule of law and its replacement with informal and tacit decisionmaking").

[304] *See supra* text accompanying notes 277-86 (describing the First Circuit's refusal to extend jurisdiction over a parent company that had no control over the alleged conduct of its subsidiary).

[305] *Supra* note 277 and accompanying text.

defendants in light of the governing controlling authorities in the circuit, from *Hargrave* forward.[306] These authorities seem to allow consideration of a wide and freewheeling variety of veil-piercing factors for jurisdictional purposes, divorced from any meaningful appraisal of the defendant's conduct in relation to the litigation and the forum.

Still, for all of their difficulties, specific jurisdiction veil-piercing cases are less troubling than general jurisdiction cases inasmuch as the conduct at issue in a specific jurisdiction case, by definition, is more closely tied to the underlying conduct that gave rise to the plaintiff's claims. No longer bound to connect a defendant's contacts in the forum to the injury sustained, the general jurisdiction veil-piercing cases depart more fully from any sensible assessment of the reasons why the exercise of jurisdiction should be sustained or declined.

C. *The Alternative to Jurisdictional Veil Piercing: Focus on Direct Contacts*

There is a better way. We may start to rethink the prevailing model of vicarious jurisdiction by turning to recent critiques by corporate law scholars of the substantive law in their field that question some of the most basic and accepted assumptions about the law of corporate disregard. If we borrow from and build upon the foundation these scholars have begun to lay in challenging the accepted wisdom regarding veil piercing, it is possible reach a new conception of modern doctrine's reliance on veil piercing for jurisdictional purposes.

1. Abandoning Veil Piercing as a Matter of Substantive Law

Both Stephen Bainbridge and Douglas Michael have recently (and independently) argued that we should abolish veil piercing as a matter of substantive law and, instead, rely on direct theories of liability.[307] Bainbridge and Michael both approach the question of veil piercing by analyzing the doctrine in two separate contexts: contract and tort. As a contractual matter, where a contract creditor has not bargained for a personal guarantee, we are reminded that piercing through the limited liability protections of the corporate form to

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[306] *See supra* text accompanying notes 252-57 (detailing Judge Rosenthal's rigorous analysis of the vicarious jurisdiction claims made for twelve of the fourteen defendants in the case).

[307] Bainbridge, *supra* note 235, at 516; Michael, *supra* note 249, at 62. Note that Bainbridge advocates abolishing veil piercing only as to natural persons; he would retain veil-piercing concepts for intragroup liability, though he urges recharacterization of the doctrine as "enterprise liability." Bainbridge, *supra* note 235, at 516, 526.

reach the shareholder rewrites the deal the parties negotiated.[308] If ABC Corporation did not obtain a personal guarantee from the controlling shareholder of XYZ, Inc., then in the absence of fraud or other personal misconduct by the shareholder, there is no sound rationale for giving ABC more than that for which it bargained. Even without veil piercing, personal liability will still be imposed—and ABC fully protected—if there is fraud or other personal misconduct by the shareholder, such as a siphoning off of funds after the contract is signed or any other act for which existing law imposes personal liability. The Model Business Corporation Act indicates the general rule in section 6.22(b): "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."[309] As Bainbridge notes: "This statutory formulation precisely captures limited liability as it ought to work: shareholders are not vicariously liable for corporate acts or debts, but shareholders may be held directly liable for their own misconduct."[310] In addition, both Michael and Bainbridge reference the work of Robert Clark who has argued that fraudulent transfer law and bankruptcy preferences ameliorate the challenges posed to creditors faced with debtors who engage in ex post siphoning of funds or secretion of other assets.[311]

Bainbridge and Michael agree that tort cases pose different challenges than contract cases,[312] but they diverge in their conclusions. Michael regards inadequate capitalization as a key aspect of injury for most veil-piercing tort cases but sees existing veil-piercing doctrine as inherently inapplicable to involuntary claimants insofar as it is predicated on corporate misrepresentations or reliance by tort victims: "The initial conceptual stumbling block is that by definition there can be no misrepresentation to, or reliance by, involuntary plaintiffs.

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[308] *See* Bainbridge, *supra* note 235, at 517 ("Where a contract creditor fails to bargain around the limited liability default rule, there is no justification for giving it a second bite at the apple through a veil piercing remedy."); Michael, *supra* note 249, at 48-49 (arguing against veil piercing in contract cases on similar grounds).

[309] MODEL BUS. CORP. ACT § 6.22(b) (1999).

[310] Bainbridge, *supra* note 235, at 516.

[311] *Id.* at 521 n.221 (citing ROBERT CHARLES CLARK, CORPORATE LAW 39 (1986)); Michael, *supra* note 249, at 48 n.56 (citing Robert Charles Clark, *The Duties of the Corporate Debtor to Its Creditors*, 90 HARV. L. REV. 505, 540-53 (1977))).

[312] *See* Bainbridge, *supra* note 235, at 487-506 (analyzing the varied justifications for limited liability of contract creditors and tort creditors); Michael, *supra* note 249, at 47 ("[T]he tort-contract distinction is important, because results do and should turn in many cases on whether the plaintiff dealt voluntarily with the corporation.").

Therefore, any discussion of fraud, or even of undercapitalization couched in reliance or expectation terms, does nothing to advance the analysis here."[313] Michael argues that we should keep the focus on failure to adequately capitalize, moving away from veil-piercing law by returning the inquiry more centrally to tort law.[314] He acknowledges that existing doctrine may need further enhancement to address the problem of tort victims satisfactorily, and, in particular, he urges recognition of a more expansive and explicit duty to adequately capitalize the corporation:

> The advantages of this duty to capitalize theory over the existing alter ego doctrine are numerous. First, consider the basis of liability. It is not some manufactured duty to follow corporate formalities, or impart to the corporation some fictional separate existence. Rather, the basis of liability would be determined according to questions of tort policy as applied to the facts at hand. As between this plaintiff and this defendant, who is better able to bear the loss? Would making the defendant liable for inadequate capitalization deter formation of "shell" corporations? Is the defendant better suited to determine the extent of risk and to insure against it, either individually or through the corporation? These are the central questions in a tort analysis, but are examined, if at all, only in a cursory fashion by courts using the veil-piercing doctrine.[315]

Bainbridge, by contrast, is skeptical, and demonstrates that focusing on undercapitalization as the basis for a common law tort claim is unworkable.[316] He traces an argument similar to the one Michael advances to Judge Kenneth Keating's dissent in the famous *Walkovszky v. Carlton*[317] case where Keating argued, inter alia, that the court should impose personal liability on a shareholder if a business is organized or operates "with capital insufficient to meet liabilities which are certain to arise in the ordinary course of the corporation's business."[318] Bainbridge observes that "Keating's proposed rule sounds sensible enough at first blush, but quickly crumbles once one begins to think about operationalizing it. . . . What liabilities are 'certain' to arise in the ordinary course of her business? And how much capital/

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[313] Michael, *supra* note 249, at 49.

[314] *See id.* at 50-51 (discussing the advantages of tort analysis based on failure to adequately capitalize).

[315] *Id.* at 50 (footnote omitted).

[316] *See* Bainbridge, *supra* note 235, at 520-21 (underscoring concerns the author believes "have motivated the courts' well-nigh universal refusal to treat undercapitalization, standing alone, as dispositive").

[317] 223 N.E.2d 6 (N.Y. 1966).

[318] Bainbridge, *supra* note 235, at 520 (quoting *Walkovszky*, 223 N.E.2d at 14 (Keating, J., dissenting)).

insurance is necessary to safeguard against them?"[319] In short, "Keating's standard thus makes *ex ante* transaction planning less certain, while increasing litigation costs by introducing some inherently ambiguous considerations into the analysis."[320] By contrast, Bainbridge urges reliance on what he calls "targeted regulation" by legislation.[321] "If taxi drivers are endangering pedestrians, then regulate taxi companies,"[322] he argues, squarely placing the responsibility for providing the legal remedy on the legislative branch where direct common law claims are unavailable. Bainbridge recognizes that public choice theory suggests that interest groups and institutional biases may make legislative reform slow or unsatisfactory.[323] His rejoinder is that "it is precisely the availability of veil piercing that lets the legislatures off the hook" and that "[j]udicial abolition of veil piercing thus might well be a useful (if not necessary) first step towards prompting legislative action."[324]

2. Proscribing Veil Piercing from Jurisdictional Doctrine

It is not necessary to delve further into the details of the debate over the differing approaches favored by Michael and Bainbridge for replacing current reliance on veil piercing to see that their works offer valuable new insights into the problem of veil piercing that can be utilized by jurisdictional theory. Just as Michael and Bainbridge argue persuasively in favor of direct-liability alternatives to reliance on the substantive law of corporate disregard, modern jurisdictional doctrine can and should eschew vicarious measures of judicial power for consideration only of the direct contacts between a defendant and the forum. If a defendant has been involved in committing some act of mischief in the forum, modern doctrine already permits the exercise of jurisdiction by the forum court over her, regardless of whether she is present in the state or not or whether she personally committed the mischief or played a role in directing such mischief from behind the scenes.[325] In the absence of jurisdictional veil piercing, the only

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[319] *Id.* at 520.

[320] *Id.*

[321] *Id.* at 524.

[322] *Id.*

[323] *See id.* at 526 ("[P]ublic choice analysis of the legislative process tells us that such legislation easily could be held up by affected interest groups.").

[324] *Id.*

[325] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("[P]arties who 'reach out beyond one state and create continuing relationships and obligations

relevance of a close relationship between otherwise separate persons or entities in a specific jurisdiction case should be part of the analysis of whether the defendant's degree of involvement with the underlying controversy is sufficient to bring it within the statutory and constitutional ambit of judicial authority. Some of the courts addressing veil piercing in the specific jurisdiction context already have reformulated the inquiry for cases relying on assertions of jurisdictional veil piercing to depend on an assessment of the particular conduct of the nonresident defendant that evidences its control of any in-state activities which give rise to the claim.[326] These courts have abandoned, in effect, the imprecise use of veil piercing and replaced it with a more searching inquiry that keeps the policy purposes of jurisdictional theory in mind.

Of course, this is not to say that the assessment of jurisdiction in cases involving multiple and related defendants necessarily will be routine and unproblematic. Some outcomes will be self-evident, while in other instances, the degree of involvement by an affiliate or owner (whether natural or corporate) necessary to demonstrate its control of the litigation-triggering events will often be elusive. On the facts of the actual *Sanifill* litigation, for instance, the First Circuit rightly refused to exercise jurisdiction where there was no evidence of the parent's direct involvement in the conduct alleged to have proximately caused the plaintiff's injuries.[327] Harder facts make for harder legal determinations, however, as slightly changing the facts in *Sanifill* illustrates.

Imagine that six months before the plaintiff's injury in *Sanifill*, the parent company issued a corporation-wide directive to its subsidiaries to cut operating costs dramatically. This time, the subsidiaries are left to determine where to reduce expenses on their own, but the parent makes plain the severity of the situation. Now the subsidiaries, feeling the pressure from the parent to reduce expenses, try to save money in ways that turn out to have safety implications; for instance, they choose not to properly maintain the waste disposal trucks. The failure to maintain the trucks properly is what causes the injury that the plaintiff ultimately sustains.

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with citizens of another state' are subject to regulation and sanctions in the other State." (quoting Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950))).

[326] *See, e.g.*, Heritage House Rest., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276, 283 (7th Cir. 1990) (noting that jurisdiction is appropriate in an instance where "a situation . . . is under the control of the nonresident defendant").

[327] DeCastro v. Sanifill, Inc., 198 F.3d 282, 283-84 (1st Cir. 1999).

In this variation of *Sanifill*, there is much less direct involvement by the parent in the conduct that is alleged to have proximately caused the accident. Consequently, if the parent does not maintain continuous and systematic contacts with the forum, amenability to suit under a direct test of jurisdiction will depend on a close evaluation of whether the absent parent's conduct is sufficient to trigger the policy justifications for exercising jurisdiction under modern doctrine. Is the not-so-subtle pressure that the parent is exercising enough to satisfy that threshold?

The problem of identifying jurisdictionally relevant contacts is suggestive of a similar problem on the liability side: as a matter of substantive law, the scope of liability as to any particular defendant will not always be clear, especially at the stage when jurisdiction is to be decided. We know that hard liability questions will always arise, and not only because the facts, or the application of those facts to the law, fall into a gray area. They also arise because more and more frequently efforts are undertaken to intentionally structure behavior to limit liability. Lynn LoPucki has described this latter phenomenon as "the death of liability" inasmuch as corporate actors have and will continue to engage in strategic judgment-proofing behavior.[328]

The problem of hard liability cases is real, and one may rightfully regard LoPucki's thesis as troubling insofar as it suggests that involuntary tort creditors will bear the costs of this strategic behavior.[329] Similarly, the problem of determining which facts should be accorded jurisdictional significance is equally daunting. Jurisdictional theory certainly is not immune to the problem of ambiguity, and the difficulties attendant to liability can have profound implications for the a priori assessment of jurisdictional amenability to suit. It is helpful, though, to be clear as to what those implications are.

Reasonable minds may differ as to the parent's liability on the *Sanifill* variation described above, just as there may be disagreement as to whether these contacts are sufficient to trigger the exercise of jurisdiction by the forum state over the parent for having given such a general directive. Is the exercise of jurisdiction over the parent appropriate merely for having given a general directive to keep costs down? The answer depends on how we balance interests. To what extent does the general directive to cut costs reflect purposeful conduct

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[328] *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996) ("[C]onstructs can be, and are, manipulated by potential defendants to create judgment-proof structures.").

[329] *Id.*

by the parent in the affairs of its forum-based affiliates? Or, framing the question slightly differently, is it reasonable for the parent to expect its subsidiaries to take steps to comply with the directive that would have the effect of putting other persons in danger? However framed, any assessment of the parent's interest in avoiding suit in the forum must then be balanced against the plaintiff's interest in maintaining suit there and the state's interest in providing a forum for relief. None of the answers to these questions are self-evident, and we should expect a divergence of opinion as to the right conclusion. This does not mean, though, that modern jurisdictional theory is incapable of being applied in a sensible and (generally) predictable manner. By contrast, under the prevailing model of vicarious jurisdiction, the parent may find itself subjected to suit in the forum without any meaningful regard for the policy purposes that animate jurisdictional theory. There is no reason to think that the assessment of control or any other meaningful inquiry previously conducted under the jurisdictional veil-piercing rubric would be any more or less demanding if the question of jurisdictional amenability turned exclusively on a defendant's direct forum nexus. In this regard, it is important to keep in mind that the question of control is itself a conclusion and not the analysis. We should not abandon one form of empty rhetorical argument for another.[330]

To be sure, countless occasions will arise in which the question of a defendant's amenability to suit will be uncertain—where the gray will dwarf the black and white. This will not change if we reject veil piercing, but the focus will at least return to assessing amenability to suit in a manner that keeps the policy purposes of jurisdictional theory closely in mind. We can take encouragement from opinions like Judge Franklin Theis's in *Energy Reserves*,[331] which illustrate that courts can and do decline to credit weak assertions of vicarious jurisdiction. Courts are capable of focusing the jurisdictional inquiry exclusively on the
direct connections among the defendant, the litigation, and the forum in specific jurisdiction cases and between the defendant and the forum in general jurisdiction cases. The main difficulty judges face at

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[330] *Cf.* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 557-58 (1995) (agreeing that jurisdictional analysis is confused when the veil-piercing test is used for vicarious purposes, but arguing that "control" of the parent by the subsidiary should be relevant for liability, not jurisdictional determination).

[331] *See supra* note 228 (noting that the exercise of jurisdiction in *Cannon* was quashed as a result of statutory problems).

present is having to decide the boundaries of territorial authority against an abundant backdrop of prior precedents that approve measuring jurisdiction vicariously through reliance on veil piercing. Abandonment of the use of veil piercing may only be the beginning point in the construction of a more unified jurisdictional theory, but if it moves us away from the prevailing model of vicarious jurisdiction, it is a move in the right direction.

Finally, it is necessary to concede that if veil piercing is proscribed from the constitutional test, direct jurisdictional theory will be asked to carry the water alone, and there may be occasions when that responsibility—which it has never borne in the modern era—may be too great for current doctrine. This is especially likely to be the case when the conduct at issue is ambiguous or strategic behavior undertaken to exploit loopholes in substantive liability rules. Put slightly differently, abandoning the prevailing model of vicarious jurisdiction may make the blemishes of direct jurisdictional theory more apparent. Whatever blemishes are revealed thereby, the extension of state court power cannot be justified merely because current doctrinal limits are deemed unsatisfactory. In transnational products liability cases, this has been the approach taken in a number of instances when frustration with the court's truncated "stream of commerce" theory has made the vicarious jurisdictional alternative more attractive.[332] The proper course is not to seek an end run around existing doctrinal limits on state court power, but to urge, instead, that those limits be rethought and modified in future cases to reach a better or more fair result. This is the essence of what lawyers and courts do and ought to do under our system of stare decisis.

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[332] *See, e.g.*, Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1327 (E.D.N.Y. 1981) (pointing out that, in relation to present jurisdictional rules, "stuffing new and complex factual patterns into absolutely rigid legal cubbyholes often results in distortion of the facts"). In urging an admittedly more freewheeling analysis of judicial jurisdiction than formal doctrine might otherwise suggest (one with "some give" in it), the court observed the following:

> To any layman it would seem absurd that our courts could not obtain jurisdiction over a billion dollar multinational which is exploiting the critical New York and American markets to keep its home production going at a huge volume and profit. This perception must have a bearing on our evaluation of fairness. The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution. An apparent growing tendency by the Supreme Court to view jurisdictional bases narrowly in the interest of what it considers to be fairness to defendants is reflected in a few recent cases.

Id.

CONCLUSION

The prevailing common law model of vicarious jurisdiction is flawed. Contrary to accepted wisdom, the use of veil piercing for jurisdictional purposes is not authorized by Justice Brandeis's decision in *Cannon.* There is much historical intrigue in the story of the law's development in this area. The Court's failure to expressly repudiate *Cannon* has undoubtedly furthered misconceptions regarding the propriety of indirectly measuring state court judicial power. Many courts have found that, following *International Shoe,* modern jurisdictional doctrine rendered *Cannon* obsolete; yet even the vast majority of courts that purport not to follow *Cannon* still regard the use of veil piercing for jurisdictional purposes as permissible. Continued acceptance of the use of veil piercing has had the effect of enshrining *Cannon* as the originating and validating source for invoking the substantive law doctrine in the jurisdictional test. The canon of *Cannon* thus remains inviolate, making it and the prevailing model of jurisdictional veil piercing hard to dispute seriously, like Don Quixote tilting at windmills.

Beyond the lack of precedential support for it, the use of veil piercing is fundamentally ill-conceived as a doctrinal tool for measuring state court power. There are pragmatic problems with applying veil piercing for jurisdictional purposes that flow directly out of the twin failings of indeterminacy and irrelevance shared by all veil-piercing cases. Additionally, a basic difficulty with the use of veil piercing for jurisdictional purposes is that it depends on the promise that judicial power may be expanded by reliance on the equitable doctrine. Yet, just as corporate law scholars critique the law of veil piercing for being irrelevant to the reasons for imposing substantive liability, vicarious jurisdiction inquiries are similarly infirm for failing to tie the justification for expanding judicial power to a normative theory for doing so. To the extent that justification is sought for vicarious jurisdiction on equity grounds as an escape hatch for those unsatisfied with the current limits on judicial jurisdiction, the exercise of indirect jurisdiction may run afoul of both the legislative prerogative to limit state court power and the Supreme Court's authority to mark the due process limits of judicial jurisdiction. Perhaps the reasonableness prong of the constitutional test, or the common law doctrine of forum non conveniens, can serve as an adequate safeguard in many cases. Jurisdictional doctrine, however, generally will continue to suffer so long as it continues to rely on the present, indefensible model of vicarious jurisdiction. Finally, while veil piercing remains a

valid alternative, the Supreme Court may be less motivated to rethink the proper limits of judicial power.

A century ago, judicial power was severely truncated by the strict territoriality principles of the day. Jurisdictional authority was coterminous with state borders in all but a few instances. Today, *International Shoe* and its progeny prohibit defendants from evading the jurisdictional grasp of a court merely by avoiding the forum. The revolution has not been bloodless, though. Trading certainty for pliancy, the doctrinal rules have become fact-bound and often unpredictable; the borders of jurisdiction are harder to identify. If the Court has been parsimonious or ambiguous in its articulation of the limits of territorial jurisdiction under the due process clause, warrant exists for rethinking existing doctrine. We do not forfeit our right to critique proper limits of state power by refusing to employ vicarious theories of jurisdiction that are both unsupported by precedent and unsound in practice.

Learned Hand once criticized the then-predominant "presence" test of jurisdiction. Asking whether a corporation is "present" in a forum was really nothing more than "shorthand" for a detailed inquiry into the defendant's forum contacts.[333] The real inquiry, Hand observed, should

> inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts. . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is "present," but at least it puts the real question, and that is something.[334]

Returning the jurisdictional inquiry to focus exclusively on the direct contacts between a defendant and the forum may not remove all of the difficulties in modern jurisdictional doctrine, but it at least puts the real jurisdictional question to be asked; and that, to paraphrase Hand, would be something.

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[333] Hutchinson v. Chase & Gilbert, Inc. 45 F.2d 139, 141 (2d. Cir. 1930).

[334] *Id.*

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